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An odd question of libel recently came before the Court of Appeals of Kentucky in Caldwell v. Story. It appears that to collect a note of appellee, Story, which Caldwell held, he gave it to certain bankers, who sent it to its correspondent bank at the home of Story for collection. The cashier of the latter bank, Simpson, presented it to Story for payment, who refused payment and, as alleged by plaintiff, directed, induced and procured the cashier to return the note with an indorsement on it as follows: "Never signed a note; fraud, forgery," etc. Caldwell filed suit for libel against Story and Simpson, alleging in the petition that the words were false, libelous and defamatory, and that they were so published, to the appellant's damage in feelings, reputation, etc. Simpson answered, and alleged that Story had directed him to make the report which he made; that the Bank of Cumberland was the corresponding agent of Trigg & Co., and that the Bank of Albany, of which he was cashier, was the corresponding agent of the Bank of Cumberland; that he received the note as the cashier of the bank; that he presented the note to Story for payment, and he refused to pay it; that it was the custom of bankers in this State, when bills and notes were received by them for collection, and payment refused, to indorse on such paper or slip attached thereto the reasons given for non-payment, and to forward the same to the bank from which the paper originally started; that he in good faith, and without malice towards the appellant or purpose to injure him, and without any intention or purpose of charging him with the crime of forgery or fraud, made the indorsement on the note;; that he in good faith made the indorsement on the note for the sole purpose of informing the appellant and his agents, Trigg & Co., the defense that Story claimed to have to the note; that the note was returned by mail from the Bank of Cumberland to Trigg & Co.; that the indorsement on the back of the note was a privileged and confidential communication to plaintiff's agent, Trigg & Co.; that he, in discharge of his duty as cashier of the Bank of Albany, made the indorsement that appellant might know the reasons which Story gave for refusing to pay the note. Upon the trial of the case the court gave a peremptory instruction to the jury to find for Simpson, which was accordingly done. No objection was made or exception taken to the giving of the instruction, and no appeal is prosecuted as to Simpson.

The general rule on the subject of privileged communications was stated by the court to be, that a communication made in good faith upon any subject in which the person has an interest, or with reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. "Under the custom of bankers, it was the duty of Simpson, as cashier of the Bank of Albany, to report the reasons for non-payment, and he made the report to the parties to whom he was under obligation to make it. The corresponding duty was upon Trigg & Co. to inform their customer the reasons which the payor of the note gave for its non-payment. In our opinion, it was a privileged communication. If this be correct, then it cannot be adjudged that Story has been guilty of libel. He may have been guilty of slander in the statement which he made to Simpson, but it necessarily follows, if the communication which Simpson made was privileged, the offense of libel was not committed."

The *National Corporation Reporter* calls attention to the fact that the Supreme Court of Illinois, in the late case of National Home Building & Loan Association v. Home Savings Bank, took strong ground on the subject of *ultra vires* acts of corporations, following the rigid law on the subject asserted by the United States Supreme Court in several cases, notably in Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24. It was heretofore supposed, as pointed out by Mr. Justice Carter of the Illinois court, that it has been a long-settled doctrine in that court where a corporation had received the benefit of it, it will be estopped from setting up its lack of charter-power to enter into the contract where it is not *malum in se* or *malum prohibitum*.

The majority opinion claims that the estoppel depends upon the sense in which the term *ultra vires* is used. The court points out that it has been applied indiscriminately to different facts in such a way as to cause considerable confusion.

"When used as applicable to some conditions, it has been frequently said that a corporation is estopped to make such a defense where it has received the benefit of the contract. For example, the term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent and acquiescence, or by the corporation receiving the benefit of the contract. Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation had a right to assume the existence of the conditions which would authorize the act. Where an act is not *ultra vires* for want of power in the corporation, but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term, it applies only to acts which are beyond the purpose of the corporation—which could not be sanctioned by the stockholders. There would, of course, be no power to confirm or ratify a contract of that kind, because the power to enter into it is absolutely wanting. If there is no power to make the contract, there can be no power to ratify it; and it would seem clear that the opposite party could not take away the incapacity, and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power."

NOTES OF IMPORTANT DECISIONS.

PRINCIPAL AND SURETY—FIDELITY BOND—INCREASE OF RISK—DISCHARGE OF SURETY.—In Kellogg v. Scott, decided by the Court of Chancery of New Jersey, it was held that where an employer increased the duties of his bookkeeper and collector, so that he was required to perform the duties of cashier, and as such had control of all the cash of the business, a surety on the employee's bond as bookkeeper and collector, conditioned for the faithful performance of his duties, and to pay over all moneys received in that capacity, was not liable thereon for an embezzlement, though accomplished by means of fraudulent entries by such employee as bookkeeper, since the extending of such employee's duties was an increase of the risk, and discharged the surety. The court says in part:

"Upon this state of facts, disclosed by complainant's evidence, it is insisted on behalf of the insurance company and the infant defendants that the misappropriations of money were made by Scott in his employment as cashier, and not as bookkeeper, and that the bond, properly construed, covers only such defalcation in Scott's capacity of bookkeeper. The general words of the condition provide that 'Scott shall well and truly account for and pay over and dispose of all moneys and property of Kellogg which may come into his possession or under his control,' and are not in terms confined to money received by him as bookkeeper; but it is claimed that, in reference to bonds of sureties for the faithful performance of the duties of an office or employment, it is a settled general rule of construction that, where the bond contains a recital of the character or scope of the employment, this recital will restrict the general words of the condition to the service specified, unless it expressly appears that it was not intended to be so restricted. The reason for thus limiting the general terms of the condition by the recital is said to be that, the object of the bond being a security on employment, if the parties state in the bond the character or scope of the employment that will be taken as indicating the limit of the surety's contract, in the absence of any words which show that the parties intended that the recital shall not have this effect. And many cases have been cited in which, on the construction of the agreement itself, the recitals have been so construed to restrict the general words in the condition. The leading case is Arlington v. Merricke, 2 Sand., and the cases are collected in note h, p. 415b; also, in 1 Chitty, Cont. (11th Am. Ed.), p. 765; 1 Brandt, Sur. ch. 6, § 166 *et seq.*; and Association v. Conkling, 90 N. Y. 116—Earl, J., page 121. But, in my judgment, the liability of the surety for a breach of the condition of the bond will still remain, even if it be held that the clause of the bond relating to the payment of money does not cover money under Scott's control as cashier. The bond secures 'the faithful performance of Scott's duty as

bookkeeper,' and this certainly includes the true entry and footing of the cash book and pay rolls, which, as bookkeeper, he makes up, as well as the duty of not abstracting his employer's money, which would come within his reach in the course of his employment as bookkeeper. For his failure to perform this duty of keeping true entries the bond for securing his faithful services as bookkeeper is forfeited, and inasmuch as he himself took the moneys, whose abstraction was concealed by the false entries which he made as bookkeeper, the employer, so far as the terms of the bond go, would, I am inclined to think, be entitled to recover substantial damages, to the amount of the abstractions, either by the bookkeeper himself in any capacity, or by another, if the abstractions were intentionally concealed from the employer by means of the false entries made by the bookkeeper. Bank v. Elwood (1860), 21 N. Y. 88, and Jephson v. Howkins (1841), 2 Man. & G. 366, seem to establish the right to recover such substantial damages as the result of false entries for the bookkeeper's own profit. But, assuming that the loss in question may be held to be the result of the failure of Scott to perform his duties as bookkeeper, the most serious question raised in reference to the liability of the surety in this bond arises from the fact that Scott was employed as cashier after the giving of this bond, which recited only his employment as bookkeeper and collector. This employment as cashier, with control, as such, over all the money of the office, as well as of the books—for he still continued as bookkeeper—was a material change by the act of the parties (Kellogg and Scott), without knowledge of the surety, in the nature of the duties of the employee; and it was a change that materially altered the duties of the employment, so as to affect the peril of the surety. The employment which was in the mind of the surety upon giving the bond, and which the obligee was about to make, was that of bookkeeper and collector. These descriptions of the character of employment do not of themselves indicate an employment which would give control of the entire cash of a business like complainant's, as well as of its books; nor is there any proof in the case that by the employment as bookkeeper and collector in complainant's business the control of the cash of the business, as cashier, was supposed by the parties to be included. The general rule is settled that in the case of bonds to secure the performance of the duties of an office or of an employment, where the nature of the employment is so altered, either by the act of the parties employer and employee, or of the legislature (in case of public office), that the risk of the surety is materially altered, the bond is avoided, even though it is forfeited by a breach of the duties of the original office or of the original employment which was the subject of the guaranty. This general rule has not been questioned since the leading cases. Bonar v. Macdonald (1850), 3 H. L. Cas. 226; Pybus v. Gibb (1856), 6 El. & Bl. 902. And these cases were approved and followed on this point in Bank v. Dickerson, 41 N. J. Law, 448, 451. The facts in this case come within the application of this rule. The bond, as I construe it, was given on the promise to the surety to employ Scott as bookkeeper and collector; and his employment, subsequent to the execution of this bond, as cashier as well as bookkeeper, did make, as I find upon the facts in the case, a material change in the nature of his employment, by which the risk of the surety was increased or varied to her disadvantage, and the bond must therefore be held void as against the surety and those who claim under her."

VENDOR AND PURCHASER—RESCISSION OF CONTRACT—BOUNDARIES OF LAND.—The Supreme Court of Tennessee decides in Bigham v. Madison, 52 S. W. Rep. 1074, that where on a sale of land the boundaries are pointed out, and the parties are mutually and honestly mistaken as to their location, and such mistake is material, and the vendee fails to get the land he intended to buy, and which the vendor thought he was selling, and had a right to sell, the vendee will be entitled to a rescission. The following is from the opinion of the court: "We think the court of chancery appeals is in error in its conclusion. We grant that its finding is conclusive that there were no false and misleading misrepresentations made by the defendants known to them to be false, and hence no actual fraud; but the facts as found by it make out a clear case of mutual mistake as to the location of the lines—a matter material to the contract, not only as to the quantity of land, but as to the location of the lines, and the specific lands the vendors thought they were selling and the vendee thought he was buying, and which were pointed out. It is well settled that a vendee of land, when it is sold in gross, or with the description 'more or less,' or 'about,' does not thereby, *ipso facto*, take all risk of quantity in the tract. Kerr, Fraud & M. § 65; 15 Am. & Eng. Enc. Law, p. 718; 1 Jones, Real Prop. § 407; 2 Warv. Vend. p. 839; Skinner v. Walker (Ky.), 34 S. W. Rep. 233; Drake v. Eubanks (Ark.), 32 S. W. Rep. 492. It is also well established that the use of the words 'more or less,' or 'about,' or similar words, in designating quantity, although they show a sale in gross, and not by the acre, covers only a reasonable excess or deficiency. 2 Warv. Vend. p. 839; 1 Jones, Real Prop. § 407; Kerr, Fraud & M. § 65; 1 Story, Eq. Jur. § 141; 15 Am. & Eng. Enc. Law, pp. 718, 719; Belknap v. Sealey, 67 Am. Dec. 120; Harrell v. Hill, 68 Am. Dec. 212; Drake v. Eubanks (Ark.), 32 S. W. Rep. 492; Stebbins v. Eddy, 4 Mason, 414, Fed. Cas. No. 13,342; Couse v. Boyles, 39 Am. Dec. 514; Pratt v. Bowman (W. Va.), 17 S. E. Rep. 210; Wheeler v. Boyd (Tex. Sup.), 6 S. W. Rep. 614; Newton v. Tolles (N. H.), 19 Atl. Rep. 1092. It has been held that such discrepancy in quantity, in order to be covered by such terms, should not exceed 10 to 15 per cent., even when

sales are confessedly in gross, and 20 per cent. is too great a difference to be so covered. 15 Am. & Eng. Enc. Law, p. 718. And 33 1-3 per cent. is such an amount as universally has obtained relief. 4 Kent Comm. (12th Ed.) 467; Harrell v. Hill, 68 Am. Dec. 212; Harrison v. Talbot, 2 Dana, 258. Mutual mistake of the contracting parties to a sale, in regard to the subject-matter of the sale, which is so material as to go to the essence of the contract, is, by all the cases, a ground for relief and rescission in a court of equity. Belknap v. Sealey, 67 Am. Dec. 120; Harrell v. Hill, 68 Am. Dec. 212; Couse v. Boyles, 38 Am. Dec. 514; Camp v. Norfleet's Admx. (Va.), 5 S. E. Rep. 375; Wheeler v. Boyd (Tex. Sup.), 6 S. W. Rep. 614; Boyd v. Moss (Tex. Civ. App.), 39 S. W. Rep. 983; Skinner v. Walker (Ky.), 34 S. W. Rep. 233; Newton v. Tolles (N. H.), 19 Atl. Rep. 1092; Hays v. Hays (Ind. Sup.), 25 N. E. Rep. 600; Hosleton v. Dickinson, 51 Iowa, 244, 1 N. W. Rep. 550; 1 Jones, Real Prop. § 407; 2 Warv. Vend. pp. 339, 340. It has also been held that, even when the parties saw the premises and knew the boundaries, it cannot prevent relief when there was mutual gross mistake as to quantity. Belknap v. Sealey, 67 Am. Dec. 120; Paine v. Upton, 41 Am. Rep. 371; Newton v. Tolles (N. H.), 19 Atl. Rep. 1092; Drake v. Eubanks (Ark.), 32 S.W. Rep. 492; Hosleton v. Dickinson, 51 Iowa, 244, 1 N.W.Rep.550. And the relief will be granted in executed as well as executory contracts. Belknap v. Sealey, 67 Am. Dec. 120; Harrison v. Talbot, 2 Dana, 259; Skinner v. Walker (Ky.), 34 S. W. Rep. 233; 2 Warv. Vend. p. 840. And relief will be granted when the mistake is so material that, if the truth had been known to the parties, the trade would not have been made. Belknap v. Sealey, 67 Am. Dec. 120; Pratt v. Bowman (W. Va.), 17 S. E. Rep. 210; Camp v. Norfleet's Admx. (Va.), 5 S. E. Rep. 375; Hosleton v. Dickinson, 51 Iowa, 244, 1 N. W. Rep. 550; 2 Warv. Vend. 227. And if quantity entered into consideration in fixing price, and price is fixed upon an estimate of quantity that proves grossly incorrect, relief will be granted. Hill v. Buckley, 17 Ves. 394; Pratt v. Bowman (W. Va.), 17 S. E. Rep. 210; Camp v. Norfleet's Admx. (Va.), 5 S. E. Rep. 375; Drake v. Eubanks (Ark.), 32 S. W. Rep. 492; Wheeler v. Boyd (Tex. Sup.), 6 S. W. Rep. 614; Hays v. Hays (Ind. Sup.), 25 N. E. Rep. 600; Skinner v. Walker (Ky.), 34 S. W. Rep. 233; Waters v. Hutton, 85 Tenn. 114, 1 S. W. Rep. 787; Meek v. Bearden, 5 Yerg. 467; 2 Warv. Vend. 838, 839. It is not necessary that fraud be shown, in order to obtain relief. Innocent and mutual mistake alone are sufficient grounds for rescission and other relief. Couse v. Boyles, 38 Am. Dec. 514; Hill v. Buckley, 17 Ves. 394; Newton v. Tolles (N.H.), 19 Atl. Rep. 1092; Hays v. Hays (Ind. Sup.), 25 N. E. Rep. 600; King v. Doolittle, 1 Head, 78; Barnes v. Gregory, *Id.* 231; Harding v. Egin, 2 Tenn. Ch. 41; Cook v. Manufacturing Co., 1 Sneed, 716; Gillespie v. Moon, 2 Johns. Ch. 585; 1 Story, Eq. Jur. § 155; Helmv. Wright, 2 Humph. 72; Cromwell v. Winchester, 2 Head, 390; Barnes v. Gregory, 1 Head, 230; Horn v. Denton, 2 Sneed, 125; 2 Pom. Eq. Jur. § 856, and note. There are differences in sales in gross, such as are evidenced by the expressions 'more or less,' 'about,' 'by estimate,' and sales at 'hazard,' when quantity is not regarded or material or estimated. In the first class of cases relief will be granted. In the latter it will not. Pratt v. Bowman (W. Va.), 17 S. E. Rep. 210; Camp v. Norfleet's Admx. (Va.), 5 S. E. Rep. 375; Waters v. Hutton, 85 Tenn. 109, 1 S. W. Rep. 787; Frenche v. Chancellor (N. J.Err. & App.), 27 Atl. Rep. 140; Harrison v. Talbot, 2 Dana, 259; Skinner v. Walker (Ky.), 34 S. W. Rep. 233; 2 Warv. Vend. p. 926. It is true, a purchaser can have no relief when he sues for lands not pointed out to him, and that he did not buy. Waters v. Hutton, 85 Tenn. 109, 1 S. W. Rep. 787; Moses v. Wallace, 7 Lea, 413; Blakemore v. Kimmons, 8 Baxt. 473; Meek v. Bearden, 5 Yerg. 467. But, while this is true, if the lines are pointed out, and the parties are mutually and honestly mistaken as to their location and as to the land embraced, when the mistake is material, and when the purchaser does not get the land he intended to buy, and which the vendor thought he was selling, and had a right to sell, it will be ground for relief and rescission upon the ground of mutual mistake which was equivalent to fraud in law."

BAILMENT OR SALE—CONSTRUCTION OF CONTRACT—BAILOR'S TITLE.—The Court of Appeals of New York say, in Sattler v. Hallock, that a bailment, and not a sale, is effected where one, under a contract, delivers material to another to manufacture, receiving on delivery the market price therefor, and the other sells it in his name, each party receiving a share of the net proceeds. The court says: "Thus is it obvious that the single question involved is whether, under the contract between the parties, the title to the property in suit vested in the plaintiff's assignors and was transferred to him by the assignment, or whether it remained in the farmers' company or the farmers furnishing it. On the trial the court held that the contract imported a sale, but submitted to the jury the question whether, under the facts and circumstances proved, including the acts of the parties, the contract had been subtantially altered, so that the title rested in the defendants or the company or persons they represented. The jury found for the defendants. The appellate division, however, held that the evidence was not sufficient to justify the submission of that question to the jury, but that the contract between the parties was one of bailment or partnership, and not of sale, and hence the plaintiff was not entitled to recover, and judgment for the defendants was properly rendered. With this situation, it is obvious that the determination of the courts below can be sustained only in case the transaction between the parties was a bailment or joint en-

terprise. If it was a bailment, manifestly the defendants were entitled to retain the possession of the property. If it was a joint enterprise, the plaintiff could not recover in an action for the conversion of the property, as the defendants were entitled to its possession, as against the plaintiff, until the matters arising under the contract were adjusted. We fully agree with the learned appellate division that there was no evidence to justify the trial court in submitting to the jury the question of an alteration or modification of the original agreement. Therefore the real question we are called upon to decide is whether the agreement of the parties imported a sale of the property to the plaintiff's assignors. If it did, and the title passed, then the plaintiff is entitled to recover; if not, then the judgment is right, and should be affirmed. In the construction of contracts, where there is no ambiguity, it is the duty of the court to determine their meaning. Moreover, where the terms and language of the contract are not disputed, its legal effect is a question of law, to be determined by the court. It is always the duty of a court, in construing a written instrument, if possible, to ascertain the intention of the parties; and, in order to determine its proper construction, resort must be had to the instrument as a whole, and effect must be given to every clause and part thereof, when it can be done without violence. Ripley v. Larmouth, 56 Barb. 21.

"With these principles in mind, we approach the question whether, under the provisions of this contract, the plaintiff's assignors were bailees of the property, or whether the contract was one of purchase and sale. One of the distinctions between a bailment and a sale is correctly pointed out in the dissenting opinion of Bronson, C. J., in Mallory v. Willis, 4 N. Y. 76, 85, as follows: 'When the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed.' Foster v. Pettibone, 7 N. Y. 435. There are, however, other principles applicable to the question. Thus, when property in an unmanufactured state is delivered by one person to another, upon an agreement that it should be manufactured or improved by his labor and skill, and when thus improved in value should be divided in certain proportions between the respective parties, it constitutes a bailment, and the original owner retains his exclusive title to the property until the contract is completly executed, although the labor to be performed by the bailee may be equal or even greater in value than that of the property when received by him. Beardsley, J., in Gregory v. Stryker, 2 Denio, 631. Again, the relation is that of bailor and bailee, where the property is thus delivered to be manufactured or improved, and afterwards there is to be a sale and a return or a division of the proceeds. Stewart v. Stone, 127 N. Y. 500, 28 N. E. Rep. 595. In Hyde v. Cookson, 21 Barb. 92, there was a written agreement between the plaintiffs and one Osborn in relation to tanning a quantity of hides. The hides were to be furnished by the plaintiffs on a commission of 5 per cent. for buying and 6 per cent. for selling the leather. Osborn was to take the hides to his tannery, manufacture them into hemlock sole leather, and return it to the plaintiffs, who were to sell it in their discretion. When sold, the account was to be made up, and the net proceeds of the sales, after deducting the costs of hides, commissions, interest, insurance and other expenses, were to be the profit or loss to accrue to Osborn in full for tanning the hides; and it was held that this was not a contract of sale, but of bailment, and that the title remained in the plaintiffs. In Pierce v. Schenck, 3 Hill, 28, logs were delivered at a sawmill under a contract with the person running the mill that he would saw them into boards, and that each party should have one-half. It was held that the transaction was a bailment; that the bailor retained his general property in the logs until they were all manufactured in pursuance of the contract; and that, as between the parties, the bailee acquired no interest in any of the boards manufactured by mere part performance within the time. In Mallory v. Willis, 4 N. Y. 76, the plaintiffs agreed to deliver merchantable wheat at a flour mill carried on by the defendant to be manufactured into flour. The defendant agreed to deliver 196 pounds of superfine flour, packed in barrels to be furnished by the plaintiffs, for every 4 bushels and 15 pounds of wheat. He was to be paid 16 cents per barrel, and 2 cents extra in case the plaintiffs made 1 shilling net profit on each barrel of flour. The defendant was to guaranty the inspection. The plaintiffs were to have the offals or feed, which the defendant was to store until sold. This court held in that case that the contract imported a bailment, and not a sale. The doctrine of that case was indorsed in Foster v. Pettibone, 7 N. Y. 433. In Mack v. Snell, 140 N. Y. 193, 35 N. E. Rep. 493, the parties entered into a contract by which the plaintiff agreed to manufacture for the defendant 1,000 pairs of pruning shears, to be in all respects like a sample furnished, the defendant to furnish the rough castings for the handles, and the plaintiff to furnish the blades. It was held that the contract was one of bailment, and not of purchase and sale, so that the title to the shears manufactured was at all times in the defendant.

"Applying these principles to the contract under consideration, we think it is quite obvious that it was one of bailment, and not of purchase and sale. Under its terms, the parties represented by the defendants were to furnish certain specified amounts of farm produce, which was to be delivered at a factory owned by them, and manufactured into pickles, sauerkraut and other similar articles. It was to be received jointly by a representative of the plaintiff's assignors and a representative of the farmers. The plaintiff's assignors were to pay the prices named for the produce furnished, to furnish the labor, ma-

chinery and materials, such as salt, spices, barrels and other necessary articles and utensils, and to pay the freight and cartage. The amount thus expended was to be deducted from the gross receipts of the sales of the articles manufactured, and the representative of the farmers was to be furnished with a full account of all of the transactions connected with the business. The manufacture and sale of the products of the Long Island Farmers' Company were to be done and made by the plaintiff's assignors, and the net proceeds were to be divided by paying 20 per cent. to the farmers or for their benefit, and the assignors to have 80 per cent. Thus the produce was to be furnished by the persons represented by the defendants, was to be manufactured by the plaintiff's assignors, to be sold as the products of the Long Island Farmers' Company, and the net profits divided. The raw material, which was owned by parties the defendants represent, was delivered to the plaintiff's assignors, to be improved by their labor and skill. It was then to be sold, and the net value divided in the proportions named. So that, clearly within the principle of the Gregory and other kindred cases, the owners of the produce thus delivered retained their title to the property until the contract had been completely executed, and this without regard to the value of the labor performed upon it by the plaintiff's assignors as such bailees. We think, when this entire contract is examined and understood, it clearly imports a bailment, and not a sale."

TRADE-MARK — INFRINGEMENT — RIGHT OF PERSON TO USE HIS OWN NAME.—The Supreme Court of Tennessee decides, in Robinson v. Storm, 52 S. W. Rep. 880, that the purchaser of the business and good will of a partnership acquires the right to a trade-mark used by the firm; that when the simulation of another's trade-mark, labels, or dress of package is such as to deceive cautious or even ordinary purchasers, it constitutes unfair competition, which equity will enjoin, and that while a person has the right to use his own name for legitimate business purposes, although injury may incidentally result to another therefrom, yet he will not be permitted to use it in a manner to commit a fraud upon purchasers, and to palm off his wares as those of another. The court says in part: "But it is argued that defendant is entitled to use his own name in placing his own medicine on the market, and that, if complainant is injured thereby, he must bear the consequences of having selected as a part of his trade-mark or trade-name a name common to others. The law is settled that no one can acquire the right of a trade-mark, either in his own name or in that of another person, so as to exclude one of the same name from using it to identify goods which he sees proper to put on the market, so long as in doing so the latter perpetrates no fraud thereby, or is guilty of no unfair artifice. In the words of the Supreme Court of New York in the well-considered case of Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. Rep. 490: 'The right of a man to use his own name in his own business the law protects, even when such use is injurious to another who has established a firm business of the same kind, and gained a reputation which goes with the name. But in such cases the courts require that the name shall be honestly used, and they permit no artifice or deceit designed or calculated to mislead the public, and palm off the business as that of the person who first established it and gained it its reputation. Croft v. Day, 7 Beav. 84; Holloway v. Holloway, 13 Beav. 209; Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. Rep. 304. It is well settled that an exclusive right may be acquired in the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purpose of deception, or even when innocently used without right, to the detriment of another; and this right, which is in the nature of a right to a trade-mark, may be sold or assigned. Levy v. Walker, 10 Ch. Div. 436; Hoxie v. Chaney, 143 Mass. 592, 10 N. E. Rep. 713; Bassett v. Percival, 5 Allen, 345; Cement Co. v. Le Page, *supra;* Millington v. Fox, 3 Mylne & C. 338.' In the case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. Rep. 1002, the foregoing principle is thus stated: 'Everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidently interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But, although he may use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. * * * Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception.' This principle was applied by the circuit court of appeals of the seventh circuit for the protection of the proprietor of 'Stuart's Dyspepsia Tablets' against a defendant who used his own name, and put on the market a medicine which he called 'Dr. Stewart's Dyspepsia Tablets.' The master in that case found, among other things, 'that the similarity in sound between "Stuart's Dyspepsia Tablets" and "Dr. Stewart's Dyspepsia Tablets" is such as would be likely to deceive careless persons, and even ordinarily careful persons, but that the appearance of the respective packages is such that no reasonably careful person could mistake one for the other. They differ materially in size and shape, and most radically in color, and in the style, color, and general appearance of the printed matter. Besides the particulars enumerated, an-

other important difference, and one which is calculated to attract immediate attention, is in the fact that the defendant's packages are covered with a sealed wrapper, while the complainant's boxes have no wrapper at all, and are not sealed in any way. Other respects in which the defendant's packages differ from the complainant's are in the presence of the abbreviation "Dr.," the absence of the fac-simile of signature, and a different spelling of the name "Stewart." ' But the court said: 'Almost in his (F. G. Stewart's) first attempt to market his wares he was advised by dealers that he was encroaching upon the rights of the appellant. It is manifest that he was. It needs no argument to show that these names are *idem sonams*, and that the use of both in connection with dyspepsia tablets must cause great confusion in the sale, and great wrong to purchasers. It is clear to us that the appellee F. G. Stewart and his corporation so understood and so designed. They knew of the extensive advertisement which the appellant indulged with respect to his goods. They knew that an immense trade had in consequence been built up, and a large demand existed for "Stuart's Dyspepsia Tablets." They sought to appropriate to themselves that good will, and to impose upon the public their manufacture as the goods of the appellant. Stewart justified himself to the wholesale dealers who cautioned him by the claim that he used his own name, and that he had a right to use it as he would. Therein he was in error. A man may not use his own name to accomplish a fraud, designed or constructive.' Stuart v. F. G. Stewart Co., 33 C. C. A. 484, 91 Fed. Rep. 247. The case of Meyer v. Medicine Co., 7 C. C. A. 558, 58 Fed. Rep. 884, was one where the complainant had placed on the market a cough syrup by the name of 'Bull's Cough Syrup' and 'Dr. Bull's Cough Syrup,' and had established a large trade. The defendant, whose name was Bull, began to put a cough remedy on the market, and designated it as 'Dr. B. L. Bull's Celebrated Cough Syrup.' Upon the bill filed, the defendant was enjoined from disposing of any remedy 'to which shall be applied, in any form or manner, as the name * * * thereof, the words "Dr. B. L. Bull's Cough Syrup," or the word "Bull's" and "Cough Syrup," etc;' the court (Harlan, Circuit Justice, and Woods, Circuit Judge) saying: 'While the right of no one can be denied to employ his name in connection with his business, or in connection with articles of his own production, so as to show the business or product to be his, yet he should not be allowed to designate his article by his own name in such way as to cause it to be mistaken for the manufacture of goods of another already on the market under the same or similar name. Whether it be his name or some other possession, everyone, by the familiar maxim, must so use his own name as not to injure the possession or right of another.' In Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. Rep. 304, the facts were that the complainant was engaged in the manufacture and sale of glue under the trade-mark of 'Le Page's Liquid Glue.' The defendant, Le Page, and one Brooks had formerly been engaged in that business, and used that trade-mark, and then sold out to the complainant. Defendant thereafter manufactured glue, and called it 'Le Page's Improved Liquid Glue,' and adopted for his name and address 'Le Page's Liquid Glue & Cement Co.,' Gloucester, Mass. Upon a bill filed, he was enjoined from the use of the trade-mark, the court holding that he should be enjoined from the use of the words 'Le Page's Liquid Glue,' or 'Le Page's Improved Liquid Glue,' to describe the articles manufactured by him, and enjoining him from using the name 'Le Page's Liquid Glue Co.,' whether with or without any addition thereto; and it further held that, while the defendant cannot use the words adopted by the plaintiff as a trade-name for the articles manufactured by him, it does not follow that he may not use the words 'liquid glue,' or other appropriate words, to describe his property, or to state, in that connection, that he is the manufacturer of it. In the English case of Seixo v. Provezende, 1 Ch. App. 192, Lord Cranworth said: 'I do not consider the actual physical resemblance of the two marks to be the question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device.' And in the case of Coffeen v. Brunton, 4 McLean, 516, Fed. Cas. No. 2,946, Judge McLean said: 'In the case under consideration, in his label the complainant calls his medicine the "Chinese Liniment;" the defendant calls his the "Ohio Liniment;" but from the body of the labels, and of the directions for the use of the medicines, it is clear that the language of the defendant is so assimilated to that of complainant as to appear to be the same medicine, the alteration being only colorable. There would seem to be no doubt that the intention of Loree, who prepared the liniment sold by defendant as his agent, was to avail himself of the favorable reputation acquired by the "Chinese Liniment" in the sale of his, and by most persons it would be received as the same medicine.' Therefore an injunction was granted. Cases of like import might be indefinitely multiplied, but we content ourselves with referring, as further authority, to Manufacturing Co. v. Gato, 25 Fla. 886, 7 South. Rep. 23; Shaver v. Shaver, 54 Iowa, 208, 6 N. W. Rep. 188; Walter Baker & Co. v. Baker, 87 Fed. Rep. 209; Duryea v. Manufacturing Co., 25 C. C. A. 139, 79 Fed. Rep. 651; Stonebraker v. Stonebraker, 33 Md. 252; Massam v. Food Co., 42 Law T. (N. S.) 851; Cox, Manual Trade-Mark Cas. No. 668."

PRESENT SCOPE OF CERTIORARI.

The writ of *certiorari* is widely understood to be a means of reviewing adjudications or like proceedings of an inferior court, or other tribunal or a board, which transcend the jurisdiction of such court, tribunal, or board. It is further sufficiently known and agreed that this extraordinary legal remedy, as it should be called, though not always so denominated in works devoted to that phase of law, may be invoked, not only where there is a total want of jurisdiction, but also where there is merely an excess of jurisdiction. But beyond this there is the greatest variation in the authorities. Assuming the record to be more than the technical record, and to bring up the evidence in some way, can the reviewing court go beyond what may strictly be called questions of jurisdiction and pass on errors of law appearing on the record? Can it even go beyond this and hear extraneous evidence? Furthermore, it is a fundamental principle governing *certiorari* that it can be invoked only in the absence of any other adequate remedy. Does this prerequisite exclude, as is usually held, the use of *certiorari* when an appeal lies, or may this remedy, as is considered in some jurisdictions, be used as a substitute for appeal in some cases or under special circumstances? These are questions of much interest to the legal profession. Some of these questions this article will seek to at least partially answer. This attempt will be made, however, not upon the basis of the innumerable decisions on every phase of the subject, many of them so loosely worded as to be apt to be misleading and sure to be confusing, but through the use of such rulings as seem to throw light on the matters involved. Especial addition will be made of rulings of recent date, which may supplement existing views of the subject, and help to exhibit the present scope of *certiorari*.

Various Uses of Certiorari.—The uses to which the writ of *certiorari* may be put are of a varied character. In general it may be said[1] that the writ of *certiorari* is employed for removing statutory proceedings for completion, when the lower court fails to do so; that it effects a review, not only of adjudications in the courts, but also of determinations of special tribunals, commissioners, and magistrates; that it serves as an auxiliary process of return to other process; and that it secures an inspection of the record where a writ of *habeas corpus* has been sued out.[2] It is the second of these uses, that of reviewing adjudications which is, however, as is familiarily known, of most importance. At common law the writ is especially used for two purposes: 1. As something like an appellate proceeding for a species of re-examination, or at any rate, a review of some action of an inferior tribunal; and 2. As auxiliary process to enable a court to obtain further information in respect to some matter already before it for adjudication. It is for the latter purpose only that the writ is usually employed in the Supreme Court of the United States.[3] But to this rule there are some exceptions. One of these arises in the utilization of the power, sparingly exercised and confined to important questions, of reviewing and determining cases at any stage of their pendency, in the circuit court of appeals, where the decision of that court thereon would, under the act of 1891 which created it, otherwise be final.[4] Under another exception *certiorari* may be invoked, whenever the circumstances imperatively demand that form of interposition, to review judgments in contempt proceedings which are rendered, or other orders which are made, in excess of

[1] See Anderson's Law Dict. 161.

[2] Concerning the use of the writ to obtain a corrected or fuller return of the proceedings from the lower court, see Stanton v. State (1883), 45 N. J. Law, or 16 Vroom. 379, at pp. 389-90, citing local authorities.

[3] United States v. Young, 94 U. S. 258, at pp. 259-60, which, however, uses less precise phraseology. See also, to like effect, American Construction Co. v. Jacksonville, etc. Ry. Co. (1893), 148 U. S. 372, at p. 380; Luxton v. North River Bridge Co. (1893), 147 U. S. 337, at p. 341. The writ is, however, held not a writ of right but discretionary with the court in *Ex parte* Hitz, 111 U. S. 766, at p. 768. Its ordinary use to review proceedings of inferior tribunals is recognized in Harris v. Barber, 129 U. S. 366, at p. 369. A motion for a writ of *certiorari* for diminution of the record was denied on special grounds in Chappell v. United States (1896), 160 U. S. 499, at pp. 506-7.

[4] Forsythe v. Hammond (1897), 166 U. S. 506, at pp. 511-15, reviewing many authorities, and explaining the reasons for the exception. See further, concerning this use of *certiorari* in recent instances, Kingman v. Western Manuf. Co. (1898), 170 U. S. 675, at pp. 676 81; The Conqueror (1897), 166 U. S. 110, at pp. 113-14; The Three Friends (1897), 166 U. S. 1, at p. 19. *Certiorari* to the circuit court of appeals was also the means of bringing up the questions involved in Smith v. Vulcan Iron Works (1897), 165 U. S. 518-26. The extent of the certification of the case is considered in Graver v. Faurot (1896), 162 U. S. 435, at pp. 436-38, reviewing the authorities.

jurisdiction, if there is no other adequate remedy.[5] What is exceptional in the Supreme Court of the United States, however, is the rule in the State jurisdictions. Ordinarily the object of a writ of *certiorari* is not to remove a cause before trial, nor to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal.[6] Nor can it be denied that, despite the chariness with which the Supreme Court of the United States allows the effectuation of the ordinary design of *certiorari*, the exceptions just noted are the manifestations of an increasing tendency to submit to the influence of the general view of the courts in this matter.

Common-Law Writ of Certiorari.—The common-law writ of *certiorari* is still utilized in various jurisdictions. Consideration of its features is therefore necessary to an apprehension of the present scope of *certiorari*. The office of the common-law writ of *certiorari*, as often and perhaps most commonly described, is to bring up the record of the proceedings of an inferior court or tribunal before a superior court to determine whether it has acted legally and within its jurisdiction.[7] It is, according to such description, in the nature of a writ of error[8] to review the proceedings of the inferior court or tribunal, and is allowed only[9] where no appeal or writ of error or other available mode of review is afforded.[10] A frequent mode of statement, which will later be seen to represent but one view of the subject, is that a common-law *certiorari* brings up the record only, and can ordinarily reach merely jurisdictional defects[11] or errors appearing upon the face of the record of the proceedings of the tribunal to which it issued.[12] Yet though the true function of the common-law writ of *certiorari* is generally to prevent inferior tribunals, where there is no appeal or writ of error, from exceeding their jurisdiction,[13] still it is not confined to cases where there is an entire want of jurisdiction. It may also be resorted to[14] where, having jurisdiction, the tribunal makes an order exceeding its powers.[15]

A more comprehensive position is, however, sometimes taken. In Illinois, for example, the broader rule, conforming to that already indicated as representing one view of the subject, is that the common law writ of *certiorari* may issue to all inferior tribunals and jurisdictions, in cases where they exceed their jurisdiction, and in cases where they proceed illegally, and there is no appeal or other mode of directly reviewing the proceedings.[16] A still wider scope, at least in one aspect, is sometimes given to the common law writ of *certiorari*. According to one view, the review may be extended to every issue of law and fact involved in the question of jurisdiction, and not only the record, but the evidence itself, when necessary for the determination of this question, must be returned.[17]

[5] *Ex parte* Chetwood (1897), 165 U. S. 443-62; *In re* Tampa Suburban R. R. Co. (1897), 168 U. S. 583, at pp. 587 88. The basis for such allowance of *certiorari* in the general power to issue "all writs not specifically provided for," etc., is shown in American Construction Co. v. Jacksonville, etc. Ry. Co. (1893), 148 U. S. 372.

[6] See Harris v. Barber (1889), 129 U. S. 366, at p. 369.

[7] State v. Edwards, 104 Mo. 125, at p. 126. See also Miller v. Jones (1885), 80 Ala. 89, at p. 93, or 22 Cent. L. J. 397.

[8] See Farmington, etc. Co. v. County Commissioners, 112 Mass. 206, at p. 212; Chicago, etc. Ry. Co. v. Young, 96 Mo. 39, at pp. 43-44.

[9] See Ennis v. Ennis, 110 Ill. 79, at p. 82.

[10] State v. Edwards, 104 Mo. 125, at p. 126. See also Alabama Great Southern R. R. Co. v. Christian, 82 Ala. 307, at p. 309; State v. Moniteau County Court, 45 Mo. App. 387, at p. 391.

[11] See Johnson v. Moss, 20 Wend. (N. Y.) 145, at p. 147.

[12] Baizer v. Lash, 28 Wis. 268, at p. 270; Hannibal, etc. R. R. Co. v. State Board of Equalization, 64 Mo. 294, at p. 308; State v. Smith, 101 Mo. 174, at p. 175; *Ex parte* Mayor, etc., 23 Wend. (N. Y.) 277, at p. 287.

[13] See Tallmadge v. Potter, 12 Wis. 317, at p. 319.

[14] See Stokes v. Knarr, 11 Wis. 389, at p. 392.

[15] State v. Moniteau County Court, 45 Mo. App. 387, at p. 392. The statements made on the subject in various cases, as collected in the case just cited, one that the writ reaches matters on the face of the record which are jurisdictional in their nature (State v. Smith, 101 Mo. 175); that the writ will reach errors which might not be fatal in a collateral proceeding (Chicago, etc. Ry. Co. v. Young, 96 Mo. 39, at p. 44); and that the writ is issued to see whether the limited jurisdictions have exceeded their "bounds." Rex v. Morley, 2 Burr. 1040, at p. 1042. In Wisconsin the common-law *certiorari* directed to a justice of the peace brings up no more than jurisdictional questions shown by the pleadings and docket entries. But upon *certiorari* to boards and officers not strictly of a judicial character, and acting out of the course of the common law, the court will examine the entire proceedings to see if they are regular and in conformity to the statute. Callon v. Sternberg (1875), 38 Wis. 539, at pp. 541-42, reviewing the cases on this subject. See also Fulton v. State (1899), 79 N. W. Rep. (Wis.) 234, at p. 235; State v. Lawler (1899), 79 N. W. Rep. (Wis.) 777, at p. 779.

[16] Miller v. Trustees, 88 Ill. 26, at p. 33; Ennis v. Ennis, 110 Ill. 78, at p. 82. See Commrs. v. Harper, 88 Ill. 103, at p. 107.

[17] Whitney v. San Francisco Fire Dept. (1860), 14 Cal. 479, at p. 500. Compare Los Angeles v. Young

Yet, according to another view, the evidence is no part of the record, and it is not the office of the writ to bring up the evidence for review.[18] Nor will a writ of *certiorari*, as at common law, be awarded to bring up for revision a judgment rendered by a justice of the peace in excess of his jurisdiction, when the party has an adequate remedy by appeal.[19]

Review of Various Views of Scope of Common Law Certiorari.—By way of summary of the various views put forth by the courts concerning the scope of the writ of *certiorari* at common law, it may be said that, in the first place, there may be extracted from the cases two views as to whether the review on the writ covers merely excess of jurisdiction, or goes beyond that. According to one view, the review extends merely to the question whether there has been an excess of jurisdiction, though not confined to the question whether there is a total want of jurisdiction.[20] Under this view, mistakes of facts or law cannot be inquired into. According to another view, the review also extends to errors appearing upon the face of the record.[21] As statements of the law looking in this direction are sometimes expressed, the office of the writ is to determine whether the inferior court has acted legally and within its jurisdiction.[22] And the writ may issue to all inferior tribunals and jurisdictions, in cases where they exceed their jurisdiction, and in cases where they proceed illegally.[23] In the next place, upon the question of what constitutes the record there is like divergence of view. On the one hand, as has just been seen, it is insisted that the evidence must be brought up to enable the review to be extended to every issue of law and fact involved in the question of jurisdiction.[24] But the merits are not, even according to this view, reviewed on a writ of *certiorari*.[25] On the other hand, the position is taken that the evidence is no part of the record to be brought up for review on *certiorari*.[26]

Statutory Changes in Writ.—Statutes in many States have extended the scope of the writ of *certiorari*, and regulated the practice concerning it. The exact nature of these statutes cannot easily be stated in a general or comparative way, because of the diversity of the enactments. All that can be done is to next state the characteristics of the current writ of *certiorari*, as now known in this country, whether the product of statutory modification or otherwise.

Review on Current Certiorari Extensively Confined to Jurisdictional Defects.—It is difficult to make any comprehensive statement concerning the extent of the review on the current *certiorari*. The doctrine which prevails so extensively as to be often called the general rule, is that inquiry will be made only into errors and defects which go to the jurisdiction of the court below, at any rate where it proceeds according to the course of the common law, and that for all other errors or irregularities the parties must resort to his remedy by appeal or writ of error.[27] It

(1897), 118 Cal. 295, at p. 298, or 62 Am. St. Rep. 234, at p. 237.

[18] Balzer v. Lash, 28 Wis. 268, at p. 270; Hannibal, etc. R. R. Co. v. State Board of Equalization, 64 Mo. 294, at p. 308. See Birdsall v. Phillips, 17 Wend. (N. Y.) 464, at p. 469. Confinement of the review to the record is asserted in Commrs. v. Harper, 38 Ill. 103, at p. 107.

[19] Ala. Great Southern R. R. Co. v. Christian (1886), 82 Ala. 307, at pp. 309-10, citing several local and more other authorities. The functions of the common law as excluding a trial *de novo*, etc., are also stated in Miller v. Jones (1885), 80 Ala. 89, at p. 93, or 22 Cent. L. J. 397. Finality of adjudication as a prerequesite to common law *certiorari*, is discussed by MacFarland, J., in State v. Edwards, 104 Mo. 125. See also State v. District Medical Soc., 35 N. J. Law, or 6 Vroom. 201, at p. 202. The same prerequisite is insisted upon for *certiorari* in general, as appears from People v. San Francisco, 40 Cal. 479. See also Lynde v. Noble, 20 Johns. (N. Y.) 80, at p. 84; Matter of Hamilton and Deane, 58 How. Pr. (N. Y.) 290, at p. 291; Stokes v. Early (1883), 45 N. J. Law, or 6 Vroom. 478, at pp. 479 80.

[20] See especially State v. Moniteau County Court, 45 Mo. App. 387, at p. 392; Johnson v. Moss, 20 Wend. (N. Y.) 145, at p. 147.

[21] Balzer v. Lash, 28 Wis. 268, at p. 270; Hannibal, etc. R. R. Co. v. State Board of Equalization, 64 Mo. 294, at p. 308; State v. Smith, 101 Mo. 174, at p. 175; *Ex parte* Mayor, etc. of Albany, 23 Wend. (N. Y.) 277, at p. 287.

[22] State v. Edwards, 104 Mo. 125, at p. 126.

[23] Miller v. Trustees, 88 Ill. 26, at p. 33; Ennis v. Ennis, 110 Ill. 78, at p. 82.

[24] Whitney v. San Francisco Fire Dept. (1860), 14 Cal. 479, at p. 500. Compare Los Angeles v. Young (1897), 118 Cal. 295, at p. 298, or 62 Am. St. Rep. 234, at p. 237.

[25] Whitney v. San Francisco Fire Dept., *supra*.

[26] Balzer v. Lash, 28 Wis. 268, at p. 270; Hannibal, etc. R. R. Co. v. State Board of Equalization, 64 Mo. 294, at p. 308.

[27] Snyder, J., in Poe v. Machine Works, 24 W. Va. 517, at pp. 520-21. See also Hauser v. State, 33 Wis. 678, at pp. 520-21; Owens v. State, 27 Wis. 456, at. p. 460; Henshaw, J., in Los Angeles v. Young (1897), 118 Cal. 295, at p. 298, or 62 Am. St. Rep. 234, at pp. 236 37; Brown v. Board of Supervisors (1899), 57 Pac. Rep. (Cal.) 82, collecting prior authorities.

is, however, illustrative of the diversity of statement on this subject, that in the very State in which the rule just given was fully laid down, a very different position was declared to be the prevalent doctrine in an earlier case.[28] According to this view, a writ of *certiorari* issued by a superior court after final judgment of the inferior court also brings up all errors of law in the record, including all actions taken on evidence before the lower court and on erroneous principles, or any action taken by such court in the absence of all evidence to justify such action.

Current Certiorari as a Substitute for Appellate Proceedings.—In some jurisdictions *certiorari* may, under certain circumstances, be utilized in place of appellate proceedings. Thus, in New Jersey, a common law *certiorari* is regarded as in the nature of a writ of error which may be invoked, where a writ of error does not lie to review the final adjudications of special statutory tribunals, which act in a summary way, different from the course of the common law.[29] So, in other jurisdictions, such as West Virginia and Tennessee, *certiorari* may be invoked where an appeal has been lost through no fault of the party seeking it.[30]

Other Matters.—The limits of the present article precludes a discussion of other pertinent matters, such as the discretion exercised in granting the writ,[31] or the introduction of extraneous evidence to supplement the record.[32] Nor is there opportunity to examine the reasons for the various views of the scope of *certiorari*, or even to suggest historical or practical causes for a tendency to extend that scope.

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[28] Dryden v. Swinburne, 20 W. Va. 89.

[29] State v. District Medical So. (1871), 35 N. J. Law, or 6 Vroom. 200, at p. 201. See also Hinchman v. Cook (1844), 20 N. J. Law, or 1 Spenc. 271, at pp. 272-73; arguments of counsel in Phillips v. Phillips (1825), 8 N. J. Law, or 3 Halst. 122, at pp. 123-25. A like doctrine is often more generally stated; Harris v. Barber (1889), 129 U. S. 366, at p. 369. See also Farrington River Water Power Co. v. County Commrs. (1873), 112 Mass. 206, at p. 212. To the New Jersey cases relating to special and summary tribunals should be added Mowery v. Camden (1886), 49 N. J. Law, or 20 Vroom. 106, at pp. 109 10. The right to *certiorari*, even where there is an appeal upon the merits, is generally asserted by Chief Justice Hornblower in New Jersey Railroad and Transp. Co. v. Suydam (1839), 17 N. J. Law, or 2 Harr. 25, at p. 40.

[30] Poe v. Machine Works, 24 W. Va. 517, per Snyder, J., at p. 520; Mayor and Alderman (or Nashville) v. Pearl (1850), 11 Humph. or 30 Tenn. 249, at p. 252; Rogers v. Ferrell (1837), 10 Yerg. or 18 Tenn. 254, at pp. 256 57; Durham v. United States (1817), 4 Hayw. (Tenn.) orig. p. 69, at p. 71; Roberts v. Cantrell (1817), 3 Hayw. (Tenn.) orig. p. 219, at p. 220. See also Dye v. Noel (1877), 85 Ill. 290, at p. 292; Cofer v. Reinschmidt (1899), 25 South. Rep. (Ala.) 769, at p. 770. Compare Beasley v. Town of Beckley, 28 W. Va. 81, at pp. 89 90. For a contrary view, see Dousman v. City of St. Paul, 22 Minn. 387, at p. 389. A leading Tennessee authority is Tomlinson v. Board of Education (1889), 88 Tenn. 1, at pp. 5-13, with dissenting opinion by Turney, C. J., at pp. 17-19, or 12 S. W. Rep. 414, at pp. 415-18, or 6 Lawy. Rep. Ann. 207, at pp. 208-11. To the list of authorities on *certiorari*, where appeal has been lost, should be added Graves v. Hines (1891), 106 N. Car. 323, at pp. 324 25, which reviews the prior North Carolina cases on the subject.

[31] See especially Harris v. Barber (1889), 129 U. S. 366, at p. 369; Farrington River Water Power Co. v. County Commrs. (1873), 112 Mass. 206, at p. 212; Rutland v. County Commrs. of Worcester, 20 Pick. (Mass.) 71, per Shaw, C. J., at pp. 79-80; Hagar v. Supervisors of Yolo County, 47 Cal. 222, at p. 228; also Keys v. Main County, 42 Cal. 252, at p. 255; People v. Supervisors of Alleghany, 15 Wend. (N. Y.) 198, at p. 206; People v. Mayor, etc. of New York, 2 Hill (N. Y.) 9, at p. 12; People v. Board of Assessors (1868), 39 N. Y. 81, at p. 88; People v. Brooklyn Commrs. (1886), 103 N. Y. 370, at pp. 371 72.

[32] Los Angeles v. Young (1897), 118 Cal. 295, at pp. 297-98, or 62 Am. St. Rep. 234, at pp. 236 37. See also, concerning this and like matters, Wulff v. Superior Court (1895), 110 Cal. 215, at p. 216, or 52 Am. St. Rep. 78, at p. 79, and note; Blair v. Hamilton (1867), 32 Cal. 49, at pp. 52 53, referring to prior cases.

SUBSCRIPTIONS—CONSIDERATION—NONJOINDER OF PARTIES—DEMURRER—MEANING OF "ENTERTAINMENT."

LASAR v. JOHNSON.

Supreme Court of California, August 10, 1899.

1. Where defendants in an action on a subscription to a social and benevolent organization requested the subscription committee to regard their subscription as cash, and to go on and make arrangements, and obligations were incurred by the committee on the faith of such request, there was a sufficient consideration to make defendants liable on their subscription, though such request was not made at the time of the subscription.

2. Where defendants in an action on a subscription to a charitable purpose, being proprietors of a hotel, agreed with the subscription committee to pay the sum subscribed, on condition that a ball or banquet should be given at their hotel, and a ball was given pursuant to this agreement, there was a good consideration for the promise to pay the sum subscribed.

3. Where a complaint in an action on a subscription to a charitable purpose shows that plaintiffs are trustees of an express trust, and states for whom they are trustees, it is sufficient, and the *cestui que trustent* need not be joined.

4. Where a defect of parties appears on the face of the complaint, the objection should be taken by demurrer.

5. The word "entertainment," as used in a subscription for the purpose of entertaining a large number of strangers, constituting an organized body, by the residents and business men of a city, is not synonymous with "board," and limited to the ordinary necessaries of life.

HAYNES, C.: The complaint alleges that plaintiffs constitute the subscription committee of Los Osos Parlor, No. 61, of the Native Sons of the Golden West, a social and benevolent organization in the city of San Luis Obispo, who, for the purpose of entertaining the grand parlor of said organization at their meeting in said city from April 26, 1896, to and including May 1, 1896, procured the signature of the defendants to a subscription paper, of which the following is a copy: "San Luis Obispo, Cal., January 1, 1896. We, the undersigned citizens and business men of the city of San Luis Obispo, do hereby agree to pay the amounts set opposite our respective names to the subscription committee of Los Osos Parlor, No. 61, N. S. G. W., on or before the fifteenth day of March, 1896, at the city of San Luis Obispo. The money so paid to be used in entertaining delegates to the grand parlor of the N. S. G. W. during their stay in the city of San Luis Obispo. Jack & Johnson, Ramona Hotel, $500.00." The complaint further alleged that "defendant signed, executed and delivered to plaintiffs said instrument upon the express condition, and the consideration therefor, and the promise contained therein, was that said committee should entertain the delegates to the grand parlor of the N. S. G. W. during their visit and stay in the city of San Luis Obispo with social pleasures and entertainment, and that a ball or banquet should be tendered and given said delegates at defendants' hotel;" that said grand parlor was convened and held during the time stated; that the delegates were entertained by social pleasures and amusements; that a ball was given at defendants' hotel; that, relying upon the promise of defendants, plaintiffs expended large amounts of money, and incurred liabilities which remain unsatisfied, and which would not have been incurred but for such promise of defendants to pay said subscription. The jury returned a verdict for the plaintiffs, and defendants appeal from the judgment entered thereon, and from an order denying their motion for a new trial. The defense to the action will sufficiently appear from the discussion of the points made by defendants for reversal.

The statement on motion for a new trial specifies as errors several rulings admitting and excluding evidence, and giving and refusing to give certain instructions, and also specifies several particulars in which it is claimed the evidence is insufficient to justify the verdict. Appellants, however, do not discuss, nor even allude directly to, any of these specifications, but discuss the broad and material questions involved in the case; and to these we will direct our attention.

It is contended that the performance of gratuitous promises depends wholly upon the good will of the promisors, and will not be enforced at law, unless the promisee has accepted and acted upon the same by incurring some obligation or expending money on the strength of it; citing Cottage Street Church v. Kendall, 121 Mass. 528. Accepting this as a correct statement of the law as applied to the facts of that case, no principle there stated is violated by the verdict and judgment in this case. By the terms of the subscription, it was payable March 15th, while the grand parlor was not to be held until April 26th. Mr. Lasar testified, in substance, that before the meeting of the parlor the committee requested payment of defendants' said subscription; that defendants said they could not pay it at that time, but would pay on April 24th, that it was as good as cash, and to go ahead and make all their arrangements; that in making their preparations they took the amount of the subscriptions in the aggregate, and considered said subscription as cash, and incurred obligations and expenses on the faith of it; that the amount of subscriptions collected was $1,914.60, and the total amount expended for the entertainment was $2,507.98, leaving a deficiency of $593.38; and that, after the grand parlor adjourned, defendants refused to pay their subscription. The request of the defendants to the committee to regard their subscription as cash, and to go on and make all their arrangements, and the action of the committee in incurring obligations on the faith of this request, was a sufficient consideration to fix the liability of the defendants upon their subscription, and it is not necessary that such request should have been made at the time of the subscription. In Presbyterian Church v. Cooper, 102 N. Y. 524, 20 N. E. Rep. 354, it was said: "There is, we suppose, no doubt that a subscription, invalid at the time for want of consideration, may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited (Barnes v. Prine, 12 N. Y. 18, and Roberts v. Cobb, 103 N. Y. 600, 9 N. E. Rep. 500), as we understand them, were supported on this principle. There was, as held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request of the promisor." Another fact showing a consideration for the promise to pay the amount sued for appears in the evidence. The defendants were the proprietors of a large hotel. At the time the subscription was made, the committee was considering the matter of giving a ball or banquet, or

both, to the delegates to the grand parlor; and, defendants desiring it, it was agreed between the committee and the defendants at the time the subscription was made, or immediately thereafter, that, if the ball and banquet were given, one of them should be given at defendants' hotel, and, in case neither was given at that hotel, defendants' subscription should be reduced to $250. This agreement converted the subscription, which upon its face was originally one to a charitable purpose simply, into a contract to pay to the committee the sum so subscribed, upon condition that a ball or banquet should be given to the grand parlor at the defendants' hotel, and a ball was given at said hotel pursuant to this agreement. This was a good consideration for the promise to pay the full sum sued for, and it is, therefore, not necessary to consider whether the defendants' liability should be reduced to its proportion of the expense incurred in entertaining the grand parlor measured by the entire amount subscribed; the amount subscribed exceeding the expenditures by the sum of $241.52, but the amount of subscriptions collected being $593.38 less than the amount expended.

Defendants objected to the introduction of any evidence on the part of the plaintiffs, upon the ground that the complaint does not state a cause of action; and this objection to the complaint was also repeated upon defendants' motion for a nonsuit, where it was specified "that the plaintiffs sue as individuals, and seek to recover in an individual capacity as trustees of an express trust." The subscription was on its face made payable "to the subscription committee of Los Osos Parlor," and the complaint alleges that the plaintiffs constituted said committee, and as such committee entertained said delegates, etc. Trustees of an express trust need not join the *cestuis que trustent* as parties, though the title of the cause should state that they sue as trustees of the person or association for whom they are acting. If, however, the body of the complaint shows that they are trustees of an express trust, and for whom they are such trustees (Spear v. Ward, 20 Cal. 659, 676; Wise v. Williams, 72 Cal. 544, 547, 14 Pac. Rep. 204), it is sufficient; and these facts appear in the complaint. Besides, the objection should have been taken by demurrer, as the alleged defect appeared upon the face of the complaint.

Appellants contended, however, that expenditures were made which did not come within the purview of this subscription for "entertainment," which, they say, is synonymous with "board," and includes the ordinary necessaries of life. The distinction between entertaining a friend at one's home, or a hotel keeper entertaining a traveler at his hotel, and entertaining a large number of strangers, constituting an organized body, by the residents and business men of a city, is quite apparent; and, as to the latter, what may be included in the entertainment of the visiting body is usually limited by the amount of money available for the purpose, and the ingenuity of the entertainers in devising sources of enjoyment. I think the record does not show that any of the money was expended for purposes not fairly within the meaning and intent of the subscription paper in that regard.

It is also contended by appellants that all the expenses of the entertainment have been fully paid, and that, therefore, they are not liable. It is shown, however, that the deficiency of $593.38 was met by borrowing that sum from one of the funds of Los Osos Parlor, which was not a fund intended to be used for the entertainment.

The supposed insufficiency of the evidence to justify the verdict appears to be based upon the alleged want of consideration for the promise, and has been sufficiently noticed. None of the alleged errors of law specified in the statement on motion for new trial are noticed in appellants' brief, and we have not discovered any that would justify a reversal of the judgment or order. I therefore advise that the judgment and order should be affirmed.

We concur: Cooper, C.; Britt, C.

NOTE.—*Gratuitous Subscriptions.*—The liability of a promisor on his gratuitous subscription has been placed on two grounds: 1st. It has been held by some courts that the promise of one is a consideration for the promise of another. Congregational Society v. Perry, 6 N. H. 164; Christian College v. Hendley, 49 Cal. 349; Higert v. Indiana Ashbury University, 53 Ind. 329; Berkeley Divinity School v. Jarvis, 32 Conn. 412; Watkins v. Eames, 9 Cush. 537; Trustees v. Stetson, 5 Pick. 506. This doctrine first originated in the case of Congregational Society v. Perry, reported in 6 N. H. 164. But a contrary view was maintained in a later case in the same State. Curry v. Rogers, 21 N. H. 247. Here the court said (p. 255): "There is no privity of contract between the parties to the suit, and nothing shown which can place them in the relation of debtor and creditor. . . . Unless some action were taken by the defendant binding upon him, whereby he became obligated to others for the purpose of carrying out the designs of the subscribers to the paper, he could be holden to the subscribers only." But in those States where the beneficiary of a contract is allowed to sue upon it, there seems to be no reason why he may not sue upon a contract of subscription, where that is valid and binding upon the subscribers. Lathrop v. Knapp, 27 Wis. 214. 2d. The promisor is liable where the promisee has made expenditures or incurred liabilities on the faith of the promise. Ohio Wesleyan Female College v. Love, 16 Ohio, 20; Whitsett v. Pre-Emption Pres. Church, 110 Ill. 125; Pryor v. Cain, 25 Ill. 263; McClure v. Wilson, 43 Ill. 361; Underwood v. Waldron, 12 Mich. 73; Conrad v. Larue, 52 Mich. 86; School District of K. C. v. Stocking, 138 Mo. 672. And the weight of modern authority is to the effect that some liability must be incurred, or something must be done upon the faith of the promise to make it binding, that one promise is not a consideration for another. *In re* Thum's Estate, 5 Pa. Dist. Rep. 739; Sutton v. Trustees of Otterbein University, 7 Ohio Circuit Ct. Rep. 343; Grand Lodge I. O. G. T. v. Farnham, 70 Cal. 158; Presbyterian Church v. Cooper, 112 N. Y. 517; Cottage Street Church v. Kendall, 121 Mass. 528. In this last case, the court say, Gray, C. J., delivering

the opinion: "The performance of gratuitous promises depends wholly upon the good will which prompted them, and will not be enforced by the law. The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made." So, in Pres. Church of Albany v. Cooper, 112 N. Y. 517, where there were several subscriptions to pay off a church debt, the court held that the agreements were unenforceable, no liability having been incurred, saying: "It has sometimes been supposed that where several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others. And this, although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. • • • The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors, and a failure to carry out as between themselves their mutual engagement. It is in no sense a case of mutual promises as between the plaintiff and defendant." Under these decisions, gratuitous subscriptions are mere continuing offers, and may be revoked at any time before their acceptance is completed by the promisee performing labor, expending money, or incurring liability upon the faith of the promise. Thus, the death or the insanity of the promisor amounts to a revocation of the subscriptions. Twenty-third St. Baptist Church v. Cornell, 117 N. Y. 601; Grand Lodge, I. O. G. T. v. Farnham, 70 Cal. 158; First Congregational Church v. Gillis. 17 Pa. Co. Ct. Rep. 614. But if any liability has been incurred before the death or insanity of the promisor, or if the withdrawal of one will increase the liability of the other, then the subscription is irrevocable. School District v. Sheidley, 138 Mo. 673; Grand Lodge v. Farnham, 70 Cal. 158.

GEO. D. HARRIS.

St. Louis, Mo.

JETSAM AND FLOTSAM.

PLEADING—PRINCIPAL AND AGENT.

In Wagener v. Kirven, 34 S. E. Rep. 18, it is held by the Supreme Court of South Carolina that in an action against a principal on a contract made by his agent, the procuration need not be alleged in the pleading, but it is sufficient to prove it at the trial. No authority is cited.

The decision is probably in accordance with the accepted doctrine, though it encourages loose pleading, and perverts the cardinal rule of pleading that the plaintiff shall so state his cause of action as to give the defendant notice of what is proposed to be proved against him, and must not allege mere conclusions of law. A principal may be legally liable on a transaction between the plaintiff and his agent, and yet be wholly ignorant of the occurrence of the transaction until disclosed at the trial. But most of the authority to be found on the subject accords with the view that the agency need not be averred in the pleading, whether the defendant be an individual or a corporation, and whether the action be in contract or in tort.

In Bennett v. Judson, 21 N. Y. 238—an action of deceit against a principal for the fraud of his agent—the complaint counted upon the false representations as made by the defendant, without any reference to the agent. Comstock, C. J., in delivering the opinion, said: "This mode of stating the case, we think, was proper under any system of pleading; the same rule of law which imputes to the principal the fraud of the agent and makes him answerable for the consequences, justifies the allegation in pleading that the principal himself committed the wrong." To the same effect are: Lee v. Sandy Hill, 40 N. Y. 442; Sullivan v. Grass Valley, etc. Co., 77 Cal. 418; Lubricating Oil Co. v. Standard Oil Co., 42 Hun, 154; Bowers v. Continental Ins. Co., 65 Tex. 51; Cramer v. Union Pac. R. Co., 3 Utah, 504; St. Andrews, etc. Co. v. Mitchell, 4 Fla. 192; School Town of Rochester v. Shaw, 100 Ind. 268; note to Orlando v. Pragg (Fla.), 34 Am. St. Repts. 28-30.

The Texas court, while adopting this view in a contractual action against a corporation (Bowers v. Continental Ins. Co., cited above), has, with reference to that case, adopted a different rule where the action is in tort against an individual. Thus in Guffey v. Moseley, 21 Tex. 408, the complaint averred that the defendant shot a slave belonging to the plaintiff, and the action was to recover damages. At the trial proof was offered by the plaintiff that the shooting was done by another slave under the direction of the defendant. This evidence was excluded, and the exclusion held proper by the appellate court, the court saying: "The theory of our system of pleadings requires the parties to state the facts of their cases, and not legal conclusions deduced from those facts; that is, the material, issuable, substantial facts should be stated, and not the legal effect of those facts, on the one hand, or matters which are merely subsidiary or evidence of the facts, on the other."

This ruling was subsequently followed in Lewis v. Hatton (Tex.), 26 S. W. Rep. 50, where it was held, in an action against the defendant for a trespass, that the plaintiff could not introduce testimony to prove that the defendant was sheriff of the county, and that the trespass was committed by his deputy, under color of his office—since the complaint had not alleged that the wrong was done by an agent. The opinion by Stayton, C. J., discusses the subject on principle, and we find it difficult not to concur in the view thus strongly presented. The case has been followed since by Peyton v. Cook (Tex.), 32 S. W. Rep. 781.—*Virginia Law Register.*

THE ASSOCIATED PRESS AND THE ANTI-TRUST ACT.

That the Associated Press is within the Act of Congress of 1890, called the Anti-Trust Law, is a fact easily proved. The news sent by this association is nearly all by telegraph; though the telephone may be used in special cases. But to come under that act it must appear to employ means which are instruments of interstate commerce, and the business must be interstate commerce.

First, what is commerce? Chief Justice Marshall said that "Commerce is undoubtedly traffic, but it is something more; it is intercourse." Gibbons v. Ogden, 9 Wheat. 1, 189. So if commerce is intercourse, then the telegraph and the telephone are common carriers of news, for they are the instrumentalities of intercourse, or communications, for the transactions

of business in its ramifications throughout the world. And the transmission of messages is commerce itself.

This proposition is sustained by the court decisions. So a telegraph is an instrument of commerce and telegraph companies occupy nearly the same relation to commerce as carriers of news that a railroad company does as carrier of goods. Both companies are instruments of commerce and their business is commerce itself; and its interstate business may be regulated by congress and not by the State. Pensacola Telegraph Co. v. Western, etc. Tel. Co., 96 U. S. 1; Telegraph Co. v. Texas, 105 U. S. 460. Of course the telegraph differs from other commerce as it transports nothing visible or tangible; it carries only ideas, wishes, orders and intelligence. Western Union Telegraph Co. v. Pendleton, 122 U. S. 347. So telegraphic communication between the States is a part of their commercial intercourse, and its regulation as commerce is within the constitutional jurisdiction of congress. Western Union Telegraph Co. v. Telegraph Co., 5 Nev. 102, 108. By the word commerce is meant every species of commercial intercourse, every communication by land or by water, foreign or domestic, external and internal. State v. Railroad Co., 30 N. J. L. 473, 478.

Telegraph lines, when extending through different States, are instruments of commerce which are protected by the federal constitution, and messages passing over such lines from one State to another constitute a portion of interstate commerce itself. Such messages come within the protection of the federal constitution and are commerce between the States. Western Union Telegraph Co. v. James, 162 U. S. 650, 654; Pensacola Telegraph Co. v. Western, etc. Tel. Co., 96 U. S. 1; Telegraph Co. v. Texas, 105 U. S. 460; Western Union Telegraph Co. v. Pendeleton, 122 U. S. 347; Western Union Telegraph Co. v. Telegraph Co., 5 Nev. 102, 108; State v. Railroad Co., 30 N. J. L. 473, 479.

So telephone lines are instruments of commerce, and persons or corporations engaged in the general telephone business are common carriers of news, which is commerce. Central Union Telephone Co. v. State, 118 Ind. 194.

The anti-trust law of 1890 strikes at combinations and contracts to monopolize trade and commerce among the several States. The Associated Press is a combination that monopolizes the transmission of news over the interstate wires of telegraphs and telephones, and discriminate among newspapers. Its object is to restrain and necessarily operates to restrain the freedom of contracts. It has agents throughout the United States and the world, who collect and transmit the news to head offices, where it is sent to special newspapers; and while it is a common carrier of news, yet it discriminates against newspapers who demand and offer to pay for such news in the different States. That is, it transmits a portion of interstate and foreign commerce to a favored few, a practice which has been declared illegal with common carriers.

The United States Supreme Court has already proclaimed in explicit terms that the anti-trust law applies to the combinations of interstate railroads, which unite to establish traffic rates for the transportation of goods and persons. United States v. Trans-Missouri Freight Association, 166 U. S. 290; United States v. Joint-Traffic Association, 171 U. S. 505.

In the Joint-Traffic case the court says that any contract or combination is illegal which shall restrain trade or commerce by shutting out the operation of the general law of competition. This doctrine will readily apply to the contracts of the Associated Press in restraint of interstate commerce by shutting out competition in discrimination against all except those belonging to the combination. It obstructs the free intercourse of a portion of interstate commerce as embraced in the collecting and transmitting of news to be sent from one State to another, and its general distribution to the members of the combination, thereby shutting out competition.

No one can deny that the transmission of messages by telephone and telegraph is commerce, and so no one can deny that, when such messages go from one State into another, it is interstate commerce. This has been settled by the United States Supreme Court beyond a doubt. So no one can deny that the gathering of news in one State and sending it by wire to another State is interstate commerce. This is what the Associated Press does; its business is a portion of interstate commerce, which under the federal constitution can be regulated by congress as it has done by enacting the anti-trust law.

The Anti-Trust Act of 1890 says: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Under this act the United States Supreme Court has decided that every contract in restraint of trade, whether reasonable or unreasonable, is illegal. United States v. Trans-Missouri Freight Asso., 166 U. S. 290.

The Associated Press has its members or newspapers in each large city, and no other member or newspaper can become a member unless the local member so consents. Then again each member is bound not to get news from any other combination that covers the same territory. Thus the Associated Press and all the subscribers are obligated to do and not to do certain things whereby the freedom to contract is restrained. All other common carriers are bound to serve all who apply, without discrimination.

In United States v. Knight Co., 156 U. S. 1, it was held that the Anti-Trust Act did not apply to the purchasing of all the sugar refineries in two or more States, as this was done in aid of manufacture, which is not interstate commerce.

But that decision does not decide that congress cannot regulate interstate commerce, or that the Act of 1890 is invalid. This court has also held that this act applies, among other things, to the transportation of interstate railroads. United States v. Trans-Missouri Freight Asso., 166 U. S. 290; United States v. Joint Traffic Asso., 171 U. S. 505. And it applies to all interstate commerce or trade, such as the business of collecting the news and sending it to other States.

All contracts, reasonable or unreasonable, in restraint of interstate commerce are illegal under the Anti-Trust Act of 1890. 26 U. S. Stat. 209.

This law certainly applies to the Associated Press, whose business is interstate commerce or intercourse, and which combination discriminates among the newspapers whose members are tied up by restrictions which shut out competition and suppress freedom of contract.—*Darius H. Pingrey, in the National Corporation Reporter.*

HUMORS OF THE LAW.

The lawyer asked the witness if the incident previously alluded to wasn't a miracle, and the witness said he didn't know what a miracle was.

"Oh, come!" said the attorney. "Supposing you

were looking out of a window in the twentieth story of a building, and should fall out and should not be injured. What would you call that?"

"An accident," was the stolid reply.

"Yes, yes; but what else would you call it? Well, suppose that you were doing the same thing the next day; suppose you looked out of the twentieth story window and fell out, and again should find yourself not injured, now, what would you call that?"

"A coincidence," said the witness.

"Oh, come, now," the lawyer began again. "I want you to understand what a miracle is, and I'm sure you do. Now, just suppose that on the third day you were looking out of the twentieth story window and fell out, and struck your head on the pavement twenty stories below and were not in the least injured. Come, now, what would you call it?"

"Three times?" said the witness, rousing a little from his apathy. "Well, I'd call that a habit."

And the lawyer gave it up.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Intent to Kill.—Where the vital question involved in the trial of an action for a death loss upon a policy of accident insurance was whether or not the slayer intended to kill the decedent, it was not erroneous to refuse to charge that a presumption of an intention to kill on the part of the slayer arose from mere proof that the homicide was committed with a weapon likely to produce death. Such a charge would, if given, have lacked an essential qualification, viz.: that the proof must further show that the weapon was used in a manner calculated to cause death.—TRAVELERS' INS. CO. v. WYNESS, Ga., 34 S. E. Rep. 113.

2. ALTERATION OF INSTRUMENTS—Pleading—Burden of Proof.—Material alterations of a note sued on having been shown, the burden is on plaintiff to show that they were made innocently, by a stranger, or for a proper purpose.—MAGUIRE v. EICHMEIER, Iowa, 80 N. W. Rep. 895.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—To constitute an effective assignment for the benefit of creditors under the insolvent act of 1881, it must affirmatively appear from the face of the instrument that it was executed under the provisions of that act; otherwise, it must be conclusively presumed to be merely a common-law assignment, under the act of 1876. In the case of a mere common-law assignment for the benefit of creditors, void for any cause, creditors may seize the property on legal process the same as if no assignment had been made, and, as a defense to an action brought by the assignee, set up the invalidity of the assignment.—LANPHER v. BURNS, Minn., 80 N. W. Rep. 361.

4. ATTACHMENT—Notice—Waiver.—Under Code 1873, § 2967, providing that the mode of attachment shall be by giving defendant and the person in possession of the property notice of the attachment, written notice to the tenant is waived by his giving a written receipt for the property attached, and by actual verbal notice.—FOSTER v. DAVENPORT, Iowa, 80 N. W. Rep. 404.

5. BANKRUPTCY—Corporations—Insurance Company.—A petition in involuntary bankruptcy cannot be maintained against an incorporated mutual fire insurance company organized under the act of the Missouri legislature approved March 21, 1895; such a corporation not being "engaged principally in manufacturing, trading, or mercantile pursuits," within the meaning of Bankruptcy Act 1898, § 4b, and therefore not being amenable to the statute.—IN RE CAMERON TOWN MUT. FIRE, LIGHTNING & WINDSTORM INS. CO., U. S. D. C., W. D. (Mo.), 96 Fed. Rep. 756.

6. BANKRUPTCY—Title to Property—Conflicting Jurisdiction.—When a court of bankruptcy, having jurisdiction in the premises, through its receiver or a trustee in bankruptcy, has taken actual possession of property scheduled by the bankrupt as assets of his estate, and holds the same for administration in bankruptcy, it is not competent for a stranger, claiming to be the owner of such property, to maintain a suit in a State court against the trustee for the purpose of establishing his title and restraining the officer from selling the property. His remedy is by petition in the court of bankruptcy.—KEEGAN v. KING, U. S. D. C., D. (Ind.), 96 Fed. Rep. 758.

7. BANKS—Stockholders' Statutory Liability.—Actions to enforce the statutory liabilities of the stockholders of an insolvent banking corporation should be brought by the creditors. A receiver, either general or special, whether appointed at the suit of a stockholder or at the suit of a creditor, has no power to bring such action.—MCLAUGHLIN v. KIMBALL, Utah, 58 Pac. Rep. 685.

8. BENEFICIAL ASSOCIATIONS—Bill to Dissolve.—Where a member of an unincorporated beneficial association filed a bill on behalf of himself and other members in good standing for its dissolution and an accounting of its funds, without joining any of its managing officers, nor its advisory committee having control of the funds, nor any of its contributing members, who might desire the continuance of the association, such bill was defective for want of necessary parties.—ATNIP v. TENNESSEE MFG. CO., Tenn., 52 S. W. Rep. 1093.

9. BILLS AND NOTES—Bona Fide Purchaser.—A *bona fide* purchaser for value of a genuine negotiable promissory note, who received the same before maturity, and without notice of any defect or defense, is entitled to have a judgment thereon against the makers, although the latter, as against the payee, may have a good defense, unless it be shown that the note was founded on a gaming or immoral and illegal consideration, or there was fraud in the procurement of the note.—JENKINS v. JONES, Ga., 34 S. E. Rep. 149.

10. BILLS AND NOTES—Law Merchant—Existence in Foreign State.—In an action by an indorsee of a fore-

ign bill, which was not protested, because of a collateral agreement of the indorser to repay the indorsee if the drawee did not, a charge that the court could not say whether or not the law merchant prevailed in the foreign country (Turkey), and that it would not necessarily govern unless the jury found that the parties expressly agreed that it should, if error, was harmless, where, under the instructions, the jury could not have found for plaintiff unless they found an unqualified promise to repay if the drawee did not.—ASLAINIAN V. DOSTUMIAN, Mass., 54 N. E. Rep. 845.

11. BILLS AND NOTES—Perjury—Surety—Extension of Time—Estoppel.—If one who signs a note as surety for another is indemnified in the full amount of the note, he is estopped to set up the defense that the time of payment has been extended in favor of the principal without his consent.—MCDOUGALL V. WALLING, Wash., 58 Pac. Rep. 669.

12. CARRIERS—Passenger—Action, Whether Contract or Tort.—A passenger, who is ejected for his refusal to pay his fare beyond the point to which his ticket entitles him to ride, cannot recover therefor in tort, unless his ejection is accompanied with unnecessary force or with insult; his remedy, if he has, by mistake of the ticket agent, been given a ticket short of the point to which he paid his fare, being an action for breach of contract in failing to give him a proper ticket.—SPINK V. LOUISVILLE & N. R. Co., Ky., 52 S. W. Rep. 1067.

13. CARRIERS OF PASSENGERS—Round Trip Tickets.—The mere fact that a railroad company has been accustomed, on a given day in each week, to sell round-trip tickets between two stations along its line of road at a rate of fare below the maximum rate fixed by law, does not entitle a person who fails to procure such a ticket by reason of the fact that the agent is absent and the ticket office is closed to be carried the round trip between such stations upon a tender to the conductor of the fare which the company has been in the past accustomed to charge, The closing of the ticket office is *prima facie* evidence that the company intended to abandon its custom, which it had a right to do, and, in the absence of facts showing that such was not its intention, such custom cannot be relied on to constitute a contract of carriage at the reduced rate which the company was formerly in the habit of charging.—JOHNSTON V. GEORGIA RAILROAD & BANKING CO., Ga., 34 S. E. Rep. 127.

14. CHATTEL MORTGAGE—Crops to be Grown in the Future.—Before a chattel mortgage on crops to be grown in the future attaches, such crops must come into existence and be acquired by the mortgagor.—MCMASTER V. EMERSON, Iowa, 80 N. W. Rep. 389.

15. CHATTEL MORTGAGE—Misdescription—Bona Fide Purchaser.—A second mortgagee who accepts a second chattel mortgage which refers in express terms to the first chattel mortgage, and covers the same property, accepts the same with full knowledge of the rights of the first mortgagee. He is not a *bona fide* purchaser or incumbrancer without notice, and cannot be heard to question the sufficiency of the description in the first mortgage.—HARDWICK V. ATKINSON, Okla., 58 Pac. Rep. 747.

16. CHATTEL MORTGAGE—Removal of Property—Estoppel.—A mortgagor of chattels went, with a prospective buyer, to the mortgagee, who agreed to cancel the mortgage when the buyer had executed a new mortgage, and consented that the buyer should remove the property; relying on which consent, the mortgagor also consented to its removal. The new mortgage was never executed, because of disagreement between the mortgagee and the buyer as to length of credit. Held, that the mortgagee was estopped from enforcing against the seller the original debt.—BANK OF ANTIGO V. RYAN, Wis., 80 N. W. Rep. 440.

17. CONTRACTS—Exemption from Liability for Negligence.—The provision contained in the regulations promulgated by the World's Columbian Exposition Company, and made known to all intending exhibitors, that the corporation would in no way be responsible for losses of any kind, however originating, was not against public policy, and was valid to exempt the company from liability for losses due to negligence, to the extent, at least, of any negligence not directly chargeable to the directors or managing officers of the company, and not of a distinctly gross, wanton, or willful character; and such regulation formed an essential part of every contract between the company and an exhibitor arising from the placing of goods on exhibition.—WORLD'S COLUMBIAN EXPO. CO. V. REPUBLIC OF FRANCE, U. S. C. C. of App., Seventh Circuit, 96 Fed. Rep. 687.

18. CONTRACT—Fraud as Defense.—Fraud, to constitute a cause of action, counterclaim, or defense, must have been fruitful of injury or damage to the party who seeks to avail of it.—CARRINGTON V. OMAHA LIFE ASSN., Neb., 80 N. W. Rep. 491.

19. CONTRACTS—Sale of Stock for Future Delivery.—A contract for the sale and purchase of stocks for future delivery, made on the Chicago Stock Exchange, by the rules of which such contracts can be closed by the payment of the difference between the market and contract price on the day of delivery, is invalid, as an option contract, under the Illinois statute (1 Starr & C. Ann. St [2d Ed.] pp. 1293-1298), and a court of equity will not entertain a suit based thereon.—CLEWS V. JAMISON, U. S. C. C. of App., Seventh Circuit, 96 Fed. Rep. 647.

20. CORPORATIONS—Acts of Directors.—When a corporation in a given matter is empowered to act only through its board of directors, or other select body of its officials, individual or separate action of the members of such board is not sufficient. The agent of the corporation is the board itself, acting in its organized capacity, and not its members, acting independently of its meetings.—MONROE MERCANTILE CO. V. ARNOLD, Ga., 34 S. E. Rep. 176.

21. CORPORATIONS—Bills and Notes—Foreign Corporations.—A note executed in Tennessee is void, even in the hands of an innocent purchaser for value, without notice, where it was given in favor of and as part of a business transaction had in that State with an Ohio corporation that had not complied with the laws prescribing the terms on which foreign corporations may do business in Tennessee.—FIRST NAT. BANK OF MASSILLON V. COUGHRON, Tenn., 52 S. W. Rep. 1112.

22. COURTS—Suits in Foreign Jurisdictions—Comity.—Where, by the laws of Maryland creating a corporation, it has been deprived of the control of its assets by the appointment of receivers, and the right to sue in such State, the courts of Delaware cannot, on grounds of comity, permit it to sue therein, or to exercise any of the powers of which it has been deprived.—E. F. KIRWAN MFG. CO. V. TRUXTON, Del., 44 Atl. Rep. 427.

23. CREDITORS' SUIT—Issues and Proof.—It is sufficient, to entitle a plaintiff to maintain a creditors' suit, to allege and prove the recovery of a judgment against the defendant prior to the commencement of such suit, the continuance of such judgment in force being presumed in the absence of affirmative proof to the contrary, which can only be given under a proper allegation in the answer.—KEDEY V. PETTY, Ind., 54 N. E. Rep. 798.

24. CRIMINAL LAW—Assault and Battery—Variance.—In a prosecution for assault and battery, a variance in the initial of the middle name of the person on whom the offense was committed, as set out in the affidavit and as shown by evidence, is not fatal.—RATCLIFF V. STATE, Ind., 54 N. E. Rep. 814.

25. CRIMINAL LAW—Incest—Accomplice Testimony.—The female participant in incestuous intercourse, whose action is voluntary, and uninfluenced by any element of coercion, either by force, fraud, fear, or undue influenced, is an accomplice in the crime of incest.—STATE V. KELLAR, N. Dak., 80 N. W. Rep. 476.

26. CRIMINAL LAW—Obtaining Money Under False Pretenses.—An indictment for obtaining money by false pretenses must state the ownership of the money alleged to have been obtained.—STATE v. MILLER, Ind., 54 N. E. Rep. 808.

27. CRIMINAL LAW—Rape—Female of Immature Years.—Where, in the trial of one charged with the offense of rape, it appeared that the female alleged to have been ravished was over 10 years of age, but of immature years, it was not error to charge, in effect, that the jury, in determining her capacity to consent to carnal knowledge of her person, might consider her physical and mental development.—JONES v. STATE, Ga., 34 S. E. Rep. 174.

28. CRIMINAL LAW—Recognizances—Arrest of Judgment.—The fact that an accused is ordered to recognize, with sureties, for his appearance before the superior court on appealing thereto from a conviction and an order imposing a fine, is no ground for an arrest of judgment.—COMMONWEALTH v. WELSH, Mass., 54 N. E. Rep. 841.

29. FIXTURES—Title—Mortgage.—A dynamo and appurtenant machines, leased by an electric light company from a manufacturer under a contract whereby the rental was to apply on the purchase price of that or a larger machine, which the company had an option to purchase within a certain time, was affixed to a timber bed laid in the cement floor of the company's power house, after the execution by the company of a mortgage on the premises. After the expiration of the option for the larger machine, the company agreed to take the one which it had, and which was adapted to the purposes of the company's business. Thereafter the dynamo was moved to a floor above, where it was kept in place by being screwed to timbers spiked to the floor; but it was sufficiently heavy to remain in place of its own weight. It was operated by a belt from shafting which was firmly attached to the floors of the building. Held, that it was a fixture, and passed to the purchaser on foreclosure of the mortgage.—GUNDERSON v. SWARTHOUT, Wis., 80 N. W. Rep. 465.

30. FRAUDS, STATUTE OF—Sale of Goods.—Defendant agreed to buy certain pop corn, provided the same should be sorted, put in bags, and delivered. After part had been delivered, he cut open one of the bags, and refused to accept the corn, because it was not properly sorted. Plaintiff, however, unknown to defendant, afterwards delivered all the corn at the place agreed upon. Held, that the delivery was not such as is contemplated by Code, § 4626, providing when an oral contract of sale may be taken out of the statute of frauds.—DIERSON v. PETERSMEYER, Iowa, 80 N. W. Rep. 389.

31. GARNISHMENT—Assignment of Debt.—Unless a garnishee defendant, who has notice that another claims an assignment of defendant's claim against him, pleads the assignment, he cannot afterwards resist the subsequent claim of the assignee by showing the judgment in the garnishment proceedings.—SEYMOUR v. C. AULTMAN & CO., Iowa, 80 N. W. Rep. 401.

32. GUARANTY—Fraud of Guarantor.—Guarantors of notes secured by a deed of trust, who obtain the maker's money with the preconceived purpose of applying it to debts of a partner of the maker, due themselves, which they do without the maker's consent or his subsequent ratification, cannot, after having become assignees of the notes and the deed of trust, recover on them, or foreclose the deed of trust.—CLEVELAND v. CARR, Tex., 52 S. W. Rep. 1049.

33. HOMESTEAD—Assignment—Alienation.—Where an execution debtor, subsequent to an execution sale of his homestead, which had been set apart by metes and bounds, or the value of which did not exceed $1,000, and on which he was living at the time of the levy and sale, and which was sold on execution subject to his homestead rights, sells and conveys, without any reservation, and surrenders possession to the grantee, and leaves the State, the grantee is entitled to the land until the homestead terminates, when it will pass to the purchaser at the execution sale.—BRISCOE v. VAUGHAN, Tenn., 52 S. W. Rep. 1068.

34. HUSBAND AND WIFE—Action for Criminal Conversation.—A husband's consent to criminal conversation with his wife will bar a recovery by him therefor.—MORNING v. LONG, Iowa, 80 N. W. Rep. 390.

35. HUSBAND AND WIFE — Alienating Affections—Pleading.—In an action for the alienation of the affections of a spouse, the declaration must allege the loss of consortium; the alienation of the affections alone not being a substantive cause of action, but merely an aggravation of damages.—NEVILLE v. GILE, Mass., 54 N. E. Rep. 841.

36. HUSBAND AND WIFE—Alienation of Husband's Affections.—An action will not lie, in favor of a wife, to recover for the alienation of her husband's affections, where there are no allegations of defendant's adultery with the husband, or that she procured or enticed or harbored and secreted him.—HOUGHTON v. RICE, Mass., 54 N. E. Rep. 844.

37. INSURANCE—Construction of Policy—Option to Repair.—A fire insurance policy contained a provision, relating to both personal property and buildings insured, that in case of loss or damage the amount of the same should be ascertained or estimated by the parties, or, in case of disagreement, by appraisers to be selected, and that, when so estimated, and proof of loss made, the same should be payable 60 days after receipt of such proof, but that "it shall be optional, however, with this company, to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged within a reasonable time on giving notice within 30 days after receipt of the proof herein required of its intention so to do." It further provided that the company should not be held to have waived any provision or condition of the policy "by any act or requirement or proceeding relative to the appraisal." Held, that the estimate or appraisal was a preliminary to, or a part of, the final proof of loss required, and that participation by the company in an appraisal to ascertain the damage done to an insured building did not constitute an election on its part to pay such damage in money, which precluded it from thereafter exercising its option to rebuild or repair on notice given within 30 days after the award of the appraisers were made.—LANGAN v. ÆTNA INS. CO., U. S. C. C., N. D. (Iowa), 96 Fed. Rep. 705.

38. JUDGMENT—Relief in Equity.—A court of equity will not set aside a verdict and judgment rendered in a justice's court on the ground that the party cast in the suit and his attorney were prevented from attending the court by a statement previously made them by the justice of the peace that the case would not be tried on the day when the same was actually heard, but on the next day thereafter, when the petition seeking such equitable relief does not charge any fraud on opposite party, or his counsel and agents, and when it fails to set forth any meritorious defense against the recovery had by the verdict.—JOHNSON v. DRIVER, Ga., 34 S. E. Rep. 158.

39. JUDGMENT—Res Judicata.—In an action to compel a reconveyance of land conveyed to defendant in trust to reconvey when he had sold enough timber off the land to satisfy his claims against the grantor, it is optional with plaintiff to join a cause of action for surplus timber sold by defendant; and hence, where he neglected to do so, the judgment for reconveyance is not a bar to a subsequent action for the value of the surplus timber sold.—TYLER v. CAPEHART, N. Car., 34 S. E. Rep. 108.

40. LIBEL—Words Used with Intent to Injure Business.—While every individual has an absolute right to refuse any business relation with another, such right is limited to his own individual action; and if, without just cause, and through ill-will, malice, or other evil motive, he influences others to do the same, he is guilty of an actionable wrong.—CHIATOVICH v. HANCHETT, U. S. C. C., D. (Nev.), 96 Fed. Rep. 681.

41. LIFE INSURANCE—Change of Beneficiaries—Validity.—Where assured changed a policy in which his children were beneficiaries so as to make it payable to one of them, a bill by one of such children alleging that she had a vested right in the policy because of an agreement as to the distribution of her parent's estate prior to the father's death, and that the ultimate change of beneficiaries was induced by fraud and undue influence, stated a cause of action, and hence was not subject to demurrers alleging facts showing such change to have been valid under the laws of the association, which did not appear on the face of the bill.—GOODRICH V. BOHAN, Tenn., 52 S. W. Rep. 1105.

42. LIMITATIONS—Repeal of Statute.—A statute of limitations which repeals a former statute on the same subject does not revive an action which has been barred by the former statute, if it is apparent from a reading of the later statute that such was not the legislative intent.—FULLER & FULLER CO. V. JOHNSON, Okla., 58 Pac. Rep. 745.

43. LIMITATION OF ACTIONS—Failure to Prosecute.—A delay of 10 years on the part of plaintiff in bringing to trial the issue of law made by the filing of a demurrer to his petition did not again set in motion the statute of limitations, which had been arrested by the bringing of the action.—CITY OF LOUISVILLE V. MEGLEMERY, Ky., 52 S. W. Rep. 1052.

44. MARRIED WOMEN — Contracts of Suretyship — Estoppel. — Under the married woman's statute of Indiana of 1881 (3 Burns' Rev. St. §§ 6960-6964), which makes void contracts of suretyship by a married woman, but provides that she shall be bound by an estoppel *in pais*, like any other person, a married woman who conveys her realty for the purpose of enabling the grantee to make a mortgage thereon for his own benefit, which he does to a person who has no knowledge of such fact, and accepts the mortgage on the faith of the recorded title, is estopped from asserting the invalidity of the transaction to defeat the mortgage.—BRAGG V. LAMPORT, U. S. C. C. of App., Seventh Circuit, 96 Fed. Rep. 630.

45. MASTER AND SERVANT—Assumed Risk—Handling Defective Cars.—A switchman employed by a railroad company in switch yards at the end of a division, where trains are inspected and defective cars taken out and placed on side tracks for repair or removal to the shops, and whose daily duty it is to couple and handle such defective cars, assumes the extra risk due to their defective condition, and which is necessarily incident to his employment.—CHESAPEAKE & O. R. CO. V. HENNESSEY, U. S. C. C. of App., Sixth Circuit, 96 Fed. Rep. 713.

46. MASTER AND SERVANT—Defective Machinery—Assumed Risk.—Where employees injured by the falling of a derrick had nothing to do with its erection or operation, and were required to work so near it that they might be injured by its fall, it cannot be said, as a matter of law, that they were negligent in working there, or that they assumed the risk of such injury.—MCMAHON V. MCHALE, Mass., 54 N. E. Rep. 854.

47. MUNICIPAL COURT — Forfeiture of Bail Bond.—Under section 698 of the Political Code, a municipal court has no authority to forfeit a bail bond unless the proper municipal authorities have adopted ordinances for this purpose, prescribing the rules and regulations and proceedings for accomplishing this end. The fact that power is given to a municipal court to take bail for the appearance of accused persons does not necessarily imply the power of such a court to forfeit the bond. If no ordinance such as above referred to has been adopted, the remedy is to bring suit upon the bond in the proper court.—KOGER V. MAYOR, ETC. OF CITY OF MADISON, Ga., 34 S. E. Rep. 133.

48. MUNICIPAL CORPORATION—Injunction.—A municipal corporation, though insolvent, cannot be enjoined from using its funds, nor can its funds be subjected, by equity, to the payment of a judgment, when there is an adequate remedy by *mandamus*.—SAFE DEPOSIT & TRUST CO. OF BALTIMORE V. CITY OF ANNISTON, U. S. C. C., N. D. (Ala.), 96 Fed. Rep. 661.

49. MUNICIPAL CORPORATIONS—Limit of Indebtedness—Contracts.—Under the provisions of Const. Ind. 1851, art. 13, that no political or municipal corporation in the State shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding 2 per centum of the value of the taxable property therein, to be ascertained by the last assessment for State and county purposes, a party contracting with a city which is indebted to the constitutional limit is charged with notice of such fact, and, if the contract purports to charge the city with any liability, the parties are *in pari delicto*, and the creditor cannot maintain an action in a court of equity to enforce any claim against the city growing out of such contract.—GAMEWELL FIRE ALARM TEL. CO. V. CITY OF LAPORTE, U. S. C. C., D. (Ind.), 96 Fed. Rep. 664.

50. MUNICIPAL CORPORATIONS—Obstruction on Sidewalk.—An apron, constructed of pine boards laid lengthwise over a cement sidewalk, and rested upon cleats laid across the walk, such apron, including boards and cleats, being less than two inches in thickness, and not extending to the end of the sidewalk, and having no cleat at the end, nor any board leading from the cement walk to the top of the apron, is a proper covering to protect pedestrians from slipping, and is not an actionable defect in the sidewalk.—KLEINER V. CITY OF MADISON, Wis., 80 N. W. Rep. 453.

51. OFFICE AND OFFICERS—Prosecuting Attorney—Eligibility of a Woman.—Under Const. art. 10, § 8, providing that in each organized county there shall be a prosecuting attorney, etc. "chosen by the electors thereof," such electors cannot choose other than one of their own number to such office, and hence a woman is not eligible, the law nowhere expressly making her so.—ATTORNEY-GENERAL V. ABBOTT, Mich., 80 N. W. Rep. 872.

52. PARTITION—Improvements.—Allowance for improvements is properly refused on sale for partition of land owned in common; the tenant in possession having arbitrarily fixed a certain amount as rent, and refused to pay more, and the rent thus wrongfully withheld being more than the value of the improvements for which he could justly claim an allowance.—BERGMAN V. KAMMLADE, Iowa, 80 N. W. Rep. 418.

53. PARTNERSHIP—Dissolution—Appointment of Receiver.—When, after the dissolution of a mercantile firm by agreement, certain of the assets were placed in the hands of each of the two persons composing the firm, for the purpose of winding up the affairs of the partnership, and they disagreed as to the value of certain specifics, and mutual charges of a violation of the agreement and mismanagement of the assets controlled by each were made, it was not error, on the application of one of the partners, to appoint a receiver to take charge of the assets of the partnership, and to dispose of the same under the direction of the court for the purpose of adjusting the rights of both partners; and this is true though no insolvency was alleged or proved.—BENNETT V. SMITH, Ga., 34 S. E. Rep. 156.

54. PLEDGE—Conversion by Pledgee.—The conversion of a promissory note deposited by a debtor with his creditor as collateral security for the payment of the debt does not entitle the debtor to a credit of the face value of the collateral, but only to an amount which represents the actual damage which he has sustained by such conversion.—FISHER V. GEO. S. JONES CO., Ga., 34 S. E. Rep. 172.

55. PRINCIPAL AND AGENT—Authority of Agent.—An agent with general powers has authority to use all the means usual and necessary to the proper transaction of the business intrusted to him. To this end he may, ordinarily, constitute another person his servant for the purpose of doing an act or acts, the performance of which does not involve the exercise of discretion, but merely obedience to the master's orders.—MCCROSKEY V. HAMILTON, Ga., 34 S. E. Rep. 111.

56. PRINCIPAL AND AGENT—Ratification.—The act of one who assumes to act for another, though without authority, may be ratified by the one for whom he assumes to act voluntarily accepting the proceeds or profits of such unauthorized act; and an instruction which tells the jury that, to amount to a ratification, the defendant must have expressly agreed by and with the plaintiff, or his duly and legally authorized agent, that such act of the agent was ratified and approved, does not correctly state the law, and is error.—FANT v. CAMPBELL, Okla., 58 Pac. Rep. 741.

57. PRINCIPAL AND SURETY—Judgment—Release of Principal's Property.—Where, after judgment against a principal and sureties, property of the principal sufficient to satisfy the judgment which has been levied on is released in an injunction proceeding by the principal, to which the sureties are not parties, such release will operate to discharge the sureties from further liability.—LEE v. SHANKS, Tenn., 52 S. W. Rep. 1092.

58. PROCESS—Married Women—Residence—Service of Writ.—The residence of the husband is the residence of the wife for the purpose of serving her with notice of action, though she has left him, it not appearing that she had sufficient legal grounds for a final separation from him, or that, when she left him, she intended the separation should be permanent, and she having afterwards returned to him.—GALVIN v. DAILEY, Iowa, 80 N. W. Rep. 420.

59. RAILROAD COMPANY — Accidents at Crossings—Contributory Negligence.—In an action against a rail. road company to recover for injuries sustained by being struck on a street crossing, whether defendant was negligent is for the jury, where the train was running at 20 miles an hour, through a populous city, over streets without any safeguards at the crossings. In an action against a railway company to recover for injuries sustained by being struck by a locomotive on a street crossing, whether plaintiff, a boy 10 years old, was negligent, is for the jury, where he stopped before going on the track, and looked for approaching trains, and, after waiting for an engine to pass, immediately started across the track, although it was not shown that he kept looking every instant of the time.—ZWACK v. NEW YORK, L. E. & W. R. CO., N. Y., 54 N. E. Rep. 785.

60. REAL ESTATE BROKER—Action for Compensation.—In an action for compensation for negotiating a purchase of property for defendant, if the conditions imposed by the owner were different from those of defendant, but he accepted them, and afterwards refused to consummate the trade, plaintiff was entitled to his compensation.—KIAM v. TURNER, Tex., 52 S. W. Rep. 1048.

61. REPLEVIN—Acts of Purchaser.—In replevin to recover goods alleged to have been purchased under fraudulent representations, findings that defendant knew he was insolvent when purchasing the goods, and that he did not disclose his insolvency, and did not intend to pay, but intended to defraud the plaintiff, are sufficient to support a judgment for plaintiff, without proof of any actual representation calculated to lead plaintiff to believe him solvent.—GOODMAN v. SAMPLINER, Ind., 54 N. E. Rep. 823.

62. REPLEVIN—Right of Intervener to Sue for Damages—Election.—Where a successful intervener in replevin, entitled, under Code 1893, § 3241, to the value or return of property from plaintiff, where the latter had acquired the same by giving a bond, elected to take the property, and made no claim for damages, he cannot maintain a separate action on the bond for injuries to the property caused by plaintiff while it was in his possession.—NEWTON v. ROUND, Iowa, 80 N. W. Rep. 891.

63. RES JUDICATA.—One who is made a party to a foreclosure cannot subsequently avoid the judgment against him by showing that the land belonged to the State, and was not the subject of contract between individuals, since, having had an opportunity to make such defense, he is as conclusively bound as if he had done so, and the court had found that title had been acquired from the State.—WALRAVEN v. FARMERS' & MERCHANTS' NAT. BANK, Tex., 52 S. W. Rep. 1049.

64. RES JUDICATA—Appeal.—A judgment in an action involving an interest in real estate is *res judicata* in an action involving title to personality; the parties being identical, and the vital issue in both suits being whether plaintiff might inherit as sole heir of a certain person, and the same evidence being required in each.—WATSON v. RICHARDSON, Iowa, 80 N. W. Rep. 416.

65. SCHOOLS—School Teacher—Contract.—An oral contract made by a school teacher with the board of trustees of a school district to teach school is invalid, and no recovery can be had for services performed thereunder in an action upon *quantum meruit*.—LELAND v. SCHOOL DIST. NO. 28 OF ST. LOUIS COUNTY, Minn., 80 N. W. Rep. 854.

66. TROVER—Equitable Assignments.—The borrowing of money which the borrower knows does not belong to the lender is a conversion, for which the borrower and lender are both liable to the real owner.—KRAMER v. WOOD, Tenn., 52 S. W. Rep. 1113.

67. TRUSTS—Compound Interest.—Where the trustee has been diligent in keeping the trust fund at interest, and the court is satisfied that he has accounted for all the interest he received, he will not be charged with compound interest, by way of punishment for his failure to keep a separate interest account, especially where he has during a long term of years made frequent statements to the *cestui que trust*, and she has approved them.—PHILLIPS v. BURTON, Ky., 52 S. W. Rep. 1064.

68. VENDOR AND PURCHASER—Breach of Warranty.—Where defendant and wife conveyed property to plaintiff, with covenant of warranty, who conveyed to a third party, who, on death of defendant's wife, was evicted from a portion thereof by her children, and plaintiff paid the third party the proportionate amount of the purchase price between them, the plaintiff can only recover the proportionate amount of the purchase price between himself and defendant, with interest thereon from the date of death of defendant's wife.—MCNALLY v. WHITE, Ind., 54 N. E. Rep. 794.

69. VENDOR AND PURCHASER—Land Contracts—Forfeiture.—A land contract provided that, if the price should be fully paid as stipulated, the vendor would execute a deed, etc., and that, if payments were not made as stipulated, the contract would be void and all payments forfeited, subject to be revived by the vendor or agreement of the parties. Held, that the vendor, only, could take advantage of the failure to pay as stipulated, and declare the contract void, and he could elect to sue for the price, or for specific performance, or declare it void.—SHENNERS v. PRITCHARD, Wis., 80 N. W. Rep. 458.

70. WATERS AND WATER-COURSES.—The water of a natural surface stream is for the benefit of all the riparian owners, and to divert or diminish its flow by arresting and collecting the percolating waters which feed it is an interference with a natural right, which will give rise to an action in damages for the injury sustained.—SMITH v. CITY OF BROOKLYN, N. Y., 54 N. E. Rep. 787.

71. WITNESS—Wife as Witness—Cross-Examination.—Where, in an action against both husband and wife, one spouse, with the consent of the other, testifies as a witness in his or her own behalf, the cross-examination is not limited to matters inquired of in the direct examination. In such case, the other spouse completely waives the statutory privilege that one spouse shall not be examined as witness for or against the other spouse without his or her consent; and the witness may be cross-examined concerning any matter pertinent to the issue, regardless of the extent of the direct examination. — NATIONAL GERMAN-AMERICAN BANK OF ST. PAUL v. LAWRENCE, Minn., 80 N. W. Rep. 863.